TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 496.

JOHN FITZPATRICK, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

FILED JANUARY 15, 1900.

(17012.)

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1 THE UNITED STATES OF AMERICA,
District of Alaska, ss:

Pleas and proceedings begun and had in the district court of the United States for the district of Alaska, in the following case, to wit:

In the United States district court for the district of Alaska, Sitka.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* JOHN FITZPATRICK, DEFENDANT.	No. 819. U. S. Revised Statutes, sec. 5339.

That at the May term of the district court of the United States of America, within and for the district of Alaska, in the year of our Lord one thousand eight hundred and ninety-eight, begun and held at Sitka, in said district, commencing on the second day of May, 1898, the following indictment was entered, which is in words and figures following, to wit:

2 *Indictment.*

THE UNITED STATES OF AMERICA, *District of Alaska:*

In the district court of the United States for the district of Alaska.

THE UNITED STATES OF AMERICA, *vs.* JOHN FITZPATRICK, HENRY BROOKS, AND WILLIAM CORBETT.	U. S. Revised Statutes, sec. 5339.

At the May term of the district court of the United States of America, within and for the district of Alaska, in the year of our Lord one thousand eight hundred and ninety-eight, begun and held at Sitka, in said district, commencing on the 2nd day of May, 1898.

The grand jurors of the United States of America, selected, empaneled, and sworn and charged within and for the district of Alaska, accuse John Fitzpatrick, Henry Brooks, and William Corbett by this indictment of the crime of murder, committed as follows:

The said John Fitzpatrick, Henry Brooks, and William Corbett at or near Dyea within the said district of Alaska and within the jurisdiction of this court, and under the exclusive jurisdiction of the United States, on the 13th day of March, in the year of our Lord one thousand eight hundred and ninety-eight, did unlawfully, wilfully, knowingly, feloniously, purposely, and of deliberate and premeditated malice make
3 an assault upon one Samuel Roberts, and that they, the said John Fitzpatrick, Henry Brooks, and William Corbett, a certain revolver, then and there charged with gunpowder and leaden bullets, which said revolver they, the said John Fitzpatrick, Henry Brooks, and William Corbett, in their hands then and there had and held, then and there feloniously, purposely and of deliberate and premeditated malice did discharge and shoot off to, against, and upon the said Samuel Roberts; and that said John Fitzpatrick, Henry Brooks, and William Corbett with one of the bullets aforesaid out of the revolver aforesaid then and

there by force of the gunpowder aforesaid by the said John Fitzpatrick, Henry Brooks, and William Corbett, discharged and shot off as aforesaid then and there feloniously, purposely, and deliberate and premeditated malice did strike, penetrate and wound him, the said Samuel Roberts, in and upon the right breast of him, the said Samuel Roberts, then and there with the leaden bullet aforesaid so as aforesaid discharged and shot out of the revolver aforesaid by the said John Fitzpatrick, Henry Brooks, and William Corbett, in and upon the right breast of him the said Samuel Roberts one mortal wound of which said mortal wound he, the said Samuel Roberts, instantly died, and so the grand jurors duly selected, empaneled, sworn and charged as aforesaid upon their oaths do say: That said John Fitzpatrick, Henry Brooks, and William Corbett did then and there kill and murder the said Samuel Roberts in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

BURTON E. BENNETT,
U. S. District Attorney.

4 (Endorsed:) No. 819. United States of America vs. John Fitzpatrick, Henry Brooks, and William Corbett. Indictment for murder violating sec. 5339, R. S., U. S. A true bill. J. Montgomery, Davis, foreman of grand jury. Filed May 14, 1898. Albert D. Elliot, clerk. Witnesses examined before the grand jury: John Ross, F. Brennen, Leroy Taylor, Charles Dall, John Lewis. Burton E. Bennett, U. S. attorney.

5 Now at this day comes the plaintiff by Burton E. Bennett, esq., U. S. attorney, and asks leave to withdraw the indictment filed herein and resubmit the same to the grand jury, and the court being sufficiently advised in the premises grants the motion, C. S. Blackett excepting thereto for all three defendants, for purpose of this motion, and defendants also being all personally present.

In the matter of the report of the grand jury.

Comes now the U. S. grand jury and returns into court one indictment, signed by Burton E. Bennett, esq., U. S. district attorney, and endorsed on the back thereof "A true bill," signed by J. Montgomery Davis, foreman of the grand jury, and Burton E. Bennett, U. S. attorney, and numbered 819.

Whereupon, the U. S. grand jury retired for further deliberation.

[Journal, page 495.]

UNITED STATES, PLAINTIFF,
vs.
JOHN FITZPATRICK, HENRY BROOKS, and WILLIAM CORBETT, defendants. } No. 819.

6 Now comes the plaintiff by Burton E. Bennett, esq., U. S. attorney, and the defendants being each present in person, and by

counsel C. S. Blackett, esq., defendants were arraigned and a copy of the indictment was served upon each defendant by the U. S. attorney in open court, and upon request of counsel were given until 10 o'clock a. m. Monday, May 16th, 1898, to plead.

[Journal, page 495.]

UNITED STATES
vs.
JOHN FITZPATRICK, HENRY BROOKS, and William Corbett. } No. 819.

Now at this day on motion of the U. S. attorney, Burton E. Bennett, and it appearing from the return of the U. S. marshal duly made herein, that a subpœna was duly served upon one Philip Ballard to attend as a witness in this cause, and that said Ballard failed and neglected to so appear herein, it is ordered that an attachment be issued forthwith for said Philip Ballard as a defaulting witness.

7 And afterwards, to wit, on the 14th day of May, A. D. 1898, the further proceeding was had, which is in words and figures following, to wit:

UNITED STATES, *District of Alaska, ss:*

I, John Cudihee, deputy U. S. marshal for the district of Alaska, residing at Dyea, being duly sworn, depose and say:

That I received a subpœna for the United States in the case of the United States vs. John Fitzpatrick, Henry Brooks, and William Corbett, duly issued by the clerk of the U. S. district court for Alaska, and that Phillip Ballard was mentioned in said subpœna as one of the persons to be subpœnaed in said case for the United States, and that I duly served the same on said Phillip Ballard by reading said subpœna to him and handing him a true and correct copy thereof to him on the 12th day of April, 1898.

That I made due return on said subpœna, but have inadvertently lost said subpœna, and have been unable to find the same, and the same is not now in my possession.

JOHN CUDIHEE,
Deputy U. S. Marshal.

Subscribed and sworn to before me this 14th day of May, 1898.
[SEAL.]
ALBERT D. ELLIOT,
Clerk U. S. District Court.

(Endorsed:) No. 819. In the U. S. dist. court for district of Alaska. United States vs. John Fitzpatrick, Henry Brooks, and William Corbett. Affidavit. Filed May 14, 1898. Albert D. Elliot, clerk.

8 No. 819.

In the United States district court for the district of Alaska.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN FITZPATRICK, DEFENDANT. } Journal entries.

[Friday, May 13, 1898. Journal page 489.]

UNITED STATES
vs.
JOHN FITZPATRICK, HENRY BROOKS, AND William Corbett. } No. 814.

Now at this day, on motion of the U. S. attorney, and it appearing by the return of the U. S. marshal that a subpœna was duly served upon Dr. Thomas Price to attend as a witness in this cause, and that he failed to appear herein;

It is ordered that an attachment be issued forthwith for said Dr. Thomas Price as defaulting witness.

9 And afterwards, to wit, on the 14th day of May, A. D. 1898, the further proceeding was had, which is in words and figures following, to wit:

In the district court of the United States for the district of Alaska.

The President of the United States of America to the marshal of said district or his deputy, greeting:

You are hereby commanded forthwith to attach the body of Phillip Ballard, defaulting witness of the United States, and have him before our said court, then and there to show cause why he should not be punished for contempt in disobeying a subpœna for the United States of this court duly served on him by U. S. marshal for dist. of Alaska, citing him to appear in this court as a witness for the United States on the 2nd day of May, 1898, and not to depart without leave, which he has done.

Witness the judge of said district court and the seal of said court hereunto affixed this 14th day of May, A. D. 1898.

[SEAL.] ALBERT D. ELLIOT, *Clerk.*

10 And afterwards, to wit, on the 16th day of May, A. D. 1898, the further proceeding was had, which is in words and figures following, to wit:

No. 819.

In the United States district court for the district of Alaska.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN FITZPATRICK, HENRY BROOKS, AND William Corbett, defendants. } Motion.

Now comes the defendants, and each of them, by their attorneys, A. K. Delaney and C. S. Blackett, and moves to quash the indictment herein

on the ground that said indictment was found by a grand jury which had been and was irregularly, illegally, and improperly drawn and empaneled.

A. K. DELANEY,
C. S. BLACKETT,
Attorneys for Defendants.

(Endorsed:) No. 819. U. S. district court. U. S. of America, vs. John Fitzpatrick, Henry Brooks, and William Corbett. Motion. Filed May 16, 1898. Albert D. Elliot, clerk. A. K. Delaney and C. A. Blackett, attys. for defts.

11 And afterwards, to wit, on the 16th day of May, A. D. 1898, the further proceeding was had, which is in words and figures following, to wit:

No. 819.

In the United States district court for the district of Alaska.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN FITZPATRICK, HENRY BROOKS, AND WILLIAM CORBETT, defendants. } Demurrer.

Come now the defendants, and each of them, John Fitzpatrick, Henry Brooks, and William Corbett, by their attorneys, A. K. Delaney and C. S. Blackett, and demurs to the indictment herein, upon the following grounds:

I.

That this court has no jurisdiction over the crime charged in the indictment herein.

II.

That said indictment does not substantially conform to the requirements of chapter 8 of the Oregon Code of Criminal Procedure applicable to this indictment.

III.

That the facts stated in said indictment do not constitute a crime.

A. K. DELANEY,
C. S. BLACKETT,
Attorneys for Defendants.

12 (Endorsed:) No. 819. U. S. district court. U. S. of America vs. John Fitzpatrick, Henry Brooks, and William Corbett. Demurrer. Filed May 16, 1898. Albert D. Elliot, clerk. A. K. Delaney and C. S. Blackett, attys. for defts.

13 [Monday, May 16, 1898. Journal, page 497.]

UNITED STATES, PLAINTIFF,
vs.
JOHN FITZPATRICK, HENRY BROOKS, and WILLIAM CORBETT, defendants. } No. 819.

Comes now the plaintiff, by Burton E. Bennett, and the defendants, in person and by their counsel, A. K. Delaney and C. S. Blackett, and the demurrer filed herein coming on to be heard and tried, and the court being fully advised in the premises overrules said demurrer, to which said defendants excepts.

[Same date and page.]

UNITED STATES, PLAINTIFF,
vs.
JOHN FITZPATRICK, HENRY BROOKS, and WILLIAM CORBETT, defendants. } No. 819.

Comes now the plaintiff, by Burton E. Bennett, esq., U. S. attorney, and the defendants, in person and by their counsel, A. K. Delaney, esq., and C. S. Blackett, esq., and the motion to quash the indictment
14 filed herein coming on to be heard and tried and the court being fully advised in the premises denies said motion, to which ruling said defendants except;

Whereupon each defendant entered a plea of not guilty to the indictment.

[Wednesday, May 18th, 1898. Journal, page 511.]

UNITED STATES
vs.
JOHN FITZPATRICK, HENRY BROOKS, and WILLIAM CORBETT, defendants. } No. 819.

Now comes the plaintiff, by Burton E. Bennett, U. S. attorney, and the defendants, in person and by their counsel, the U. S. attorney serves in open court a list of witnesses to be produced upon the trial and a list of the venire of the petit jury on each of the defendants.

15 And afterwards, to wit, on the 19th day of May, A. D. 1898, the further proceeding was had, which is in words and figures following, to wit:

In the district court of the United States for the district of Alaska.

The President of the United States of America to the marshal of said district, or to his deputy, greeting:

You are hereby commanded to subpœna Frank Biles to be and appear in said court at Sitka, in said district, forthwith, on Friday, the 20th day of May 1898, at 10 o'clock a. m., then and there to testify on behalf of the United States, and not depart the court without leave thereof, or

of the district attorney. And hereof fail not, and have you then and there this writ with your doings indorsed thereon.

Witness the judge of said district court and the seal of said court hereunto affixed, this 19th day of May, A. D. 1898.

[SEAL.] ALBERT D. ELLIOTT, *Clerk.*

16 UNITED STATES, *District of Alaska, ss:*

In obedience to the within warrant I have the body of the said Phillip Ballard before the Hon. district court of the United States for the district of Alaska, this 21 day of May, 1898.

JAMES M. SHOUP, *Marshal,*
By W. H. MCNAIR, *Deputy.*

(Endorsed:) No. 819. In the district court of the United States for the district of Alaska. United States vs. John Fitzpatrick, Henry Brooks, and William Corbett. Attachment. Returned and filed May 21, 1898. Albert D. Elliott, clerk.

17 And afterwards, to wit, on the 21st day of May, A. D. 1898 the further proceeding was had, which is in words and figures following, to wit:

In the United States district court for the district of Alaska.

UNITED STATES } No.
vs.
FITZPATRICK. }

The clerk will please issue a subpœna for Miss Hatch, of Dyea, a stenographer, office in P. O., with her stenographic notes of the examination before com'r in this case, witness for defendants in said cause, to appear in said court forthwith.

Dated at Sitka, Alaska, May 21st, 1898.

ARTHUR K. DELANEY,
Attorney for Deft. Fitzpatrick.

(Endorsed:) No. 819. U. S. vs. Fitzpatrick et al. Præcipe for subpœna. Filed May 21, 1898. Albert D. Elliott, clerk. Arthur K. Delaney, attorney for Dft. Fitzpatrick.

18 And afterwards, to wit, on the 21st day of May, A. D. 1898, the further proceeding was had, which is in words and figures following, to wit:

In the district court of the United States, district of Alaska.

UNITED STATES OF AMERICA, *District of Alaska, ss:*

The President of the United States of America to Miss Hatch (stenographer, Dyea, office in P. O.), greeting:

You are hereby commanded to appear before the district court of the United States for the district of Alaska, at Sitka, in said district, forthwith, to testify as a witness on behalf of the deft. in the case of U. S. vs.

Fitzpatrick et al., and bring with you your stenographic notes of the examination in this case as taken by you before the U. S. com'r. Hereof fail not.

Witness the honorable Chas. S. Johnson, judge of said court, and the seal thereof, affixed at Sitka, in said district, this 21st day of May, A. D. 1898.

[SEAL.] ALBERT D. ELLIOT, *Clerk.*

19 [Monday, May 23rd, 1898. Journal, page 532.]

UNITED STATES, PLFF.,
vs.
JOHN FITZPATRICK, HENRY BROOKS, and WILLIAM CORBETT, defendants. } No. 819.

Comes now the plaintiff by Burton E. Bennett, U. S. attorney, and the defendants being present in person and by counsel, the said plaintiff moves the court to set this cause for trial at 10.00 o'clock a. m. to-morrow, whereupon the defendants object and the court being sufficiently advised denies said motion.

[Tuesday, May 24th, 1898. Journal, page 535.]

UNITED STATES, PLFF.,
vs.
JOHN FITZPATRICK, HENRY BROOKS, and WILLIAM CORBETT, defts. } No. 819.

Comes now the plaintiff by Burton E. Bennett, U. S. attorney, and the defendants being present in person and by A. K. Delaney
20 and C. S. Blackett, their counsel, on motion of the U. S. attorney to set this cause for trial, after hearing the arguments of counsel and the court being sufficiently advised in the premises,

It is ordered, That said cause be set for trial on Thursday morning, May 26th, 1898, at 10 o'clock a. m., the defendants to have until the incoming of the next mail steamer to put in their defense, to all of which said defendants duly excepted.

[May 25th, 1898. Journal, pages 538-9.]

UNITED STATES
vs.
JOHN FITZPATRICK, HENRY BROOKS, and WILLIAM CORBETT. } No. 819.

Now, at this day, the motion of C. S. Blackett, esq., attorney for defendants herein, that attachment be issued out of this court on behalf of defendants for the arrest of Neal Murphy, Dr. Bailey, and William Kennedy, defaulting witnesses in this case, and Burton E. Bennett, U. S. attorney, appearing in opposition thereto, and the court being fully advised in the premises, grants said motion; whereupon,

It is ordered, That attachment be issued for the arrest of each of said defaulting witnesses forthwith, to wit: Neal Murphy, Dr. Bailey, and William Kennedy.

21 And afterwards, to wit, on the 24th day of May, A. D. 1898, the further proceeding was had, which is in words and figures following, to wit:

In the United States district court for the District of Alaska.

UNITED STATES *vs.* JOHN FITZPATRICK, HENRY BROOKS, and Wm. Corbett.	No.

The clerk will please issue a subpœna for Frank Alger, Al Bailey, Geo. Wallace, Stevens, William Kennedy, Neal Murphy, Miss Hatch, witnesses for defendants in said cause, to appear in said court at Sitka, Alaska, on the 24th day of May, 1898.

Dated at Sitka, Alaska, May 24th, 1898.

A. K. DELANEY,
C. S. BLACKETT,
Attorneys for Defendants.

(Endorsed:) No. 819. United States vs. John Fitzpatrick et al. Præcipe for subpœna. Filed May 24, 1898; Albert D. Elliott, clerk.

22 And afterwards, to wit, on the 24th day of May, 1898, the further proceeding was had, which is in words and figures following, to wit:

No. 819.

In the district court of the United States, District of Alaska.

UNITED STATES OF AMERICA,
District of Alaska, ss:

The President of the United States of America to Frank Alger, Al Bailey, Geo. Wallace, Stevens, William Kennedy, Neal Murphy, and Miss Hatch, greeting:

You are hereby commanded to appear before the district court of the United States for the District of Alaska, at Sitka, in said District, forthwith, to testify as a witness on behalf of the defendants in the case of United States vs. John Fitzpatrick, Henry Brooks, and William Corbett. Hereof fail not.

Witness the honorable C. S. Johnson, judge of said court, and the seal thereof affixed at Sitka, in said District, this 24th day of May, A. D. 1898.

[SEAL.] ALBERT D. ELLIOT, *Clerk.*

23 UNITED STATES, *District of Alaska, ss:*

I hereby certify that I received the within subpœna on May 19, 1898, and that I served the same at Sitka, Alaska, on May 21, 1898, by reading and showing the original to the within-named Frank Biles, personally, and delivering to and leaving with him a subpœna ticket containing the substance of the within command.

Dated Sitka, Alaska, May 25, 1898.

JAMES M. SHOUP, *U. S. Marshal.*
By W. H. MCNAIR, *Deputy.*

(Endorsed:) No. 819. In the district court of the United States for the District of Alaska. United States of America vs. John Fitzpatrick et al. Subpœna for the plff. Returned and filed May 25, 1898. Albert D. Elliott, clerk.

24 And afterwards, to wit, on the 25th day of May, A. D. 1898, the further proceeding was had, which is in words and figures following, to wit:

In the district court of the United States for the District of Alaska.

The President of the United States of America to the marshal of said district, or his deputy, greeting:

You are hereby commanded forthwith to attach the body of Neal Murphy, defaulting witness, and have him before our said court, then and there to show cause why he should not be punished for contempt in disobeying a subpœna of this court duly served on him by the U. S. marshal for the district of Alaska, commanding him to appear in this court as a witness on behalf of the defendants forthwith in the case of The United States vs. John Fitzpatrick, Henry Brooks, and William Corbett.

Witness the judge of said district court and the seal of said court hereunto affixed this 25th day of May, A. D. 1898.

[SEAL.] ALBERT D. ELLIOT, *Clerk.*

25 And afterwards, to wit, on the 25th day of May, A. D. 1898, the further proceeding was had, which is in words and figures following, to wit:

In the district court of the United States for the District of Alaska.

The President of the United States of America, to the marshal of said district, or his deputy, greeting:

You are hereby commanded, forthwith, to attach the body of Dr. Bailey, defaulting witness, and have him before our said court, then and there to show cause why he should not be punished for contempt in disobeying a subpœna of this court duly served on him by the U. S. marshal for the District of Alaska, commanding him to appear in this court as a witness on behalf of the defendants forthwith, in the case of the United States vs. John Fitzpatrick, Henry Brooks, and William Corbett.

Witness the judge of said district court and the seal of said court hereunto affixed this 25th day of May, A. D. 1898.

[SEAL.] ALBERT D. ELLIOT, *Clerk.*

26 And afterwards, to wit, on the 25th day of May, A. D. 1898, the further proceeding was had, which is in words and figures following, to wit:

In the district court of the United States for the District of Alaska.

The President of the United States of America, to the marshal of said district, or his deputy, greeting:

You are hereby commanded, forthwith, to attach the body of Wm. Kennedy, defaulting witness, and have him here before our said court, then

and there to show cause why he should not be punished for contempt in disobeying a subpœna of this court duly served on him by the U. S. marshal for the District of Alaska, commanding him to appear in this court as a witness on behalf of the defendants forthwith, in the case of the United States vs. John Fitzpatrick, Henry Brooks, and William Corbett.

Witness the judge of said district court and the seal of said court hereunto affixed this 25th day of May, A. D. 1898.

[SEAL.] ALBERT D. ELLIOT, *Clerk.*

27 And afterwards, to wit, on the 25th day of May, A. D. 1898, the further proceeding was had, which is in words and figures following, to wit:

No. 819.

In the United States district court for the District of Alaska.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN FITZPATRICK, HENRY BROOKS, AND WILLIAM CORBETT, DEFENDANTS. } Affidavit.

UNITED STATES OF AMERICA, *District of Alaska, ss:*

A. K. Delaney, being first duly sworn, deposes and says: That he is one of the attorneys for the defendants in the foregoing entitled action, and that he arrived at Sitka on board the steamer "Queen" which left here on the 13th day of the present month, and upon examination of the records found that an indictment had been found and returned against the defendants on the 11th day of May, A. D. 1898, charging them with the crime of murder, and that said defendants had been arraigned but had not ple'd to said indictment; that the steamer "Queen" left on the 13th day of May, 1898, for Alaska and Puget Sound ports, and
28 that prior to the departure of said steamer the said defendants, by their attorneys, caused a subpœna to be issued for certain witnesses, whose names appear in said subpœna, now on file in this court, and that such subpœna was placed in the hands of the marshal, and, subsequently, was served at Dyea and Skagway upon a part of the witnesses named in such subpœna, and that other witnesses named therein are returned by said marshal as not found; that the witnesses subpœnaed under and by virtue of said writ have not yet arrived at Sitka in pursuance of the mandate of said subpœna; that on the 14th day of May, 1898, the said indictment returned on the 11th inst. was withdrawn, and the present indictment, charging, substantially, the same offense, was found and returned, and that the evidence upon the present indictment, on behalf of the defendants, is substantially the same as would be upon the trial of the indictment returned on the 11th inst.

That it is entirely unsafe for the defendants, or either of them, to proceed with the trial of this cause without the said witnesses being present; that in addition to the foregoing, upon the arrival of the "Cottage City" and ascertaining that the said witnesses so subpœnaed, as aforesaid, had not come to Sitka by the said boat, the defendants caused a special messenger, Mr. Joseph Fitzpatrick, brother of one of these defendants, to

be sent to Skagway and Dyea for the purpose of obtaining said witnesses, if possible, and that upon the arrival of said "Cottage City" this deponent for the first time learned from Attorney M. E. McInerny, who appeared for the defendants in the preliminary examinations herein, held before United States Commissioners Ostrander and Smith, that a Miss Hatch, a stenographic reporter at Dyea, had taken in shorthand the minutes of the testimony as disclosed at the said examinations, and that, as this deponent was informed by said McInerny and verily believes, the same had been transcribed by the said stenographic reporter into long-hand, which said minutes and transcript were in the possession
29 of the said Miss Hatch; that this deponent arranged with said Attorney McInerny that the said minutes should be procured from the said stenographic reporter and delivered to the said special messenger Fitzpatrick, and that the said McInerny promised this deponent so to do, and also caused a subpœna duces tecum to issue for said Hatch, which was placed in the hands of the marshal before "Cottage City" sailed for below; that the said minutes are of the very greatest importance to the defendants upon this trial for reasons which must be obvious to the court; that this deponent has good reason to believe and does believe that upon the arrival of the steamer "Geo. W. Elder," due at this port next Saturday, the 28th instant, according to the printed schedule of the Pacific Coast Steamship Company, he will be enable' to procure the witnesses who have been subpœnaed, and also a transcript of the stenographic report of the testimony taken at said examination by the said Miss Hatch.

Deponent, therefore, on behalf of the defendants, asks the court to postpone the empaneling of the jury and the trial of this cause until the arrival of the said steamer "Geo. W. Elder."

A. K. DELANEY.

Subscribed and sworn to before me this 25th day of May, 1898.

[SEAL.] ALBERT D. ELLIOTT,
Clerk U. S. Dist. Court for Alaska.

(Endorsed:) No. 819. U. S. district court. U. S. of America vs. John Fitzpatrick, Henry Brooks, and William Corbett. Affidavit of A. K. Delaney. Filed May 26, 1898; Albert D. Elliott, clerk. A. K. Delaney and C. S. Blackett, attorneys for defendants.

30 [May 26th, 1898. Journal, page 340.]

UNITED STATES,
vs.
JOHN FITZPATRICK, HENRY BROOKS, and WILLIAM CORBETT. } No. 819.

Now at this day, on motion of A. K. Delaney, attorney for defendants, to suspend all proceedings in the trial of this case coming on to be heard, and after hearing Burton E. Bennett, esq., U. S. attorney, in opposition thereto, and the court being sufficiently advised in the premises,

It is ordered that the trial of this cause be, and the same is hereby, continued until the incoming of the next mail steamer, provided that in

no event shall such continuance be extended beyond Tuesday, May 31st, 1898, at 10.00 o'clock a. m. of that day, said mail steamer failing to arrive before that time.

31 UNITED STATES OF AMERICA,
Dist. of Alaska, ss:

I hereby certify that I received this subpœna on the 21st day of May, 1898, and that I served the same on the 26th day of May, 1898, at the town of Dyea, Dist. of Alaska, by reading this subpœna to the Miss Hatch named in this subpœna and delivering to her a subpœna ticket properly executed and signed.

JAMES M. SHOUP, *U. S. Marshal.*
By S. S. TAYLOR, *Deputy.*

(Endorsed:) No. 819. In the district court of the United States for the District of Alaska. U. S. vs. Fitzpatrick et al. Subpœna for the Dft. Returned and filed May 28, 1898; Albert D. Elliott, clerk.

32 And afterwards, to wit, on the 31st day of May, A. D. 1898, the further proceeding was had, which is in words and figures following, to wit:

No. 819.

In the United States district court for the District of Alaska.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN FITZPATRICK, HENRY BROOKS, AND WILLIAM CORBETT, defendants. } Affidavit.

UNITED STATES OF AMERICA,
District of Alaska, ss:

Henry Brooks and William Corbett, being each first duly sworn, depose and say: That they are two of the defendants in the foregoing entitled action; that they are advised by their counsel and believe that on the 11th day of May, A. D. 1898, an indictment was found and returned in the above-entitled court by the grand jury of the May term of the said court in the District of Alaska, charging them with the crime of murder; that pending a plea to said indictment, by and through our counsel, we caused to be issued a subpœna for Frank Alger, Ben Stevens,
33 George Wallace, William Kennedy, Al Bailey, and Neil Murphy, who are material witnesses in our behalf in the trial of the above-entitled action; that thereafter said subpœna was duly and legally placed in the hands of the U. S. marshal, the executive officer of said court, for service, which subpœna on the 13th day of May, 1898, was duly en route to Dyea, Alaska, the place of residence of the witnesses above mentioned; that thereafter an auxiliary or substitute indictment was returned into court by said grand jury on the 14th day of May, 1898, charging all of the defendants in the above-entitled action with the crime of murder in the first degree, and immediately thereafter said first indictment so filed on the 11th day of May, 1898, on motion of the district attorney in person, and in his behalf, was withdrawn by order of court, and

the defendants required to plead to said new or substituted indictment so returned on the 14th day of May, A. D. 1898; that said defendants, and all of them, by their counsel, thereupon caused a subpœna to be issued in the above-entitled action for the witnesses heretofore named, with additional witness Miss Hatch, a stenographic reporter, together with her notes and testimony taken at the preliminary examination in our said hearing before the examining magistrates, Commissioners Ostrander and Smith, which subpœna was duly and regularly placed in the hands of the United States marshal for service on the —— and —— days of May, A. D. 1898, which said subpœna has not been returned into court by said marshal; that under the schedule of the Pacific Coast Steamship Company, who operate and control the regular mail steamers plying between said Juneau, Dyea, and Sitka, Alaska, said United States marshal could not serve said process upon said witnesses and return the same to the court, nor would said witnesses after said service have time to appear in said court, prior to the arrival at Sitka, Alaska, of a certain regular mail steamer, named the "Cottage City," due June 5th,
34 1898; that these affiants, and each of them, expect to prove, each for himself, as follows, to wit:

Your affiant Brooks expects to prove by the witnesses Alger, Stevens, Wallace, Bailey, and Kennedy that he, the said Brooks, was at the Skagit Hotel from nine thirty (9.30) o'clock p. m. of the evening of the 12th of March, 1898, to after three o'clock (3.00) a. m. of the morning of the 13th day of March, 1898, being at said Skagit Hotel during the hours and dates fixed in said indictment herein charging said Brooks with the crime of murder.

That he, the said Corbett, expects to prove by the said witnesses Alger, Stevens, Wallace, Bailey, and Kennedy, that he, the said Corbett, was at the Skagit Hotel and William Kennedy's place of business during the evening of the 12th day of March, 1898, and the morning of the 13th day of March, 1898, until about three o'clock (3.00) a. m. on said morning.

That the testimony before the examining magistrate disclosed that said homicide alleged in said indictment took place at two thirty o'clock (2.30) a. m. on the morning of March 13th, 1898, about three-quarters ($\frac{3}{4}$) of a mile from said Skagit Hotel and William Kennedy's place of business, and that during said time I, the said Corbett, was in and about the aforesaid places of business, all of which facts said witnesses would testify to if present at this trial; that I know of no other witnesses by whom said alibi could be proven, and that if this trial should be postponed until the next term of this court I have reason to believe that said witnesses would be then present and testify to the facts above stated.

HENRY BROOK.
WM. CORBETT.

Subscribed and sworn to before me this 31st day of May, A. D. 1898.
[SEAL.] ALBERT D. ELLIOT,
Clerk of the U. S. Dist. Court for the District of Alaska.

35 (Endorsed:) No. 819. U. S. district court. U. S. of America vs. John Fitzpatrick et al. Affidavit of Henry Brooks and Wm. Corbett. Filed May 31, 1898, Albert D. Elliot, clerk. C. S. Blackett, attorney for defendants Brooks and Corbett.

36 [Tuesday, May 31, 1898. Journal, page 543.]

UNITED STATES, PLFF.,
vs.
JOHN FITZPATRICK, HENRY BROOKS, and WILLIAM CORBETT, defts. } No. 819.

Now, at this day comes the defendants in person and by counsel, and the motion of C. S. Blackett for a continuance for the term of this cause as to defendant William Corbett coming on to be heard, the U. S. attorney appearing in opposition thereto, and the court, being fully advised in the premises, denies said motion.

Also at the same time the motion of A. K. Delaney on behalf of defendant John Fitzpatrick for a continuance for the term of the above-entitled cause coming on to be heard, and being opposed by the U. S. attorney, and the court, being fully advised in the premises, denies said motion.

Now at this day, on motion of the U. S. attorney, it is ordered that F. D. Kelsey, esq., be and he is hereby appointed and sworn reporter to take the testimony in the above-entitled cause.

37 And afterwards, to wit, on the 26th day of May, 1898, the further proceeding was had, which is in words and figures following, to wit:

No. 819.

In the United States district court for the district of Alaska.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN FITZPATRICK, HENRY BROOKS, AND WILLIAM CORBETT, defendants. } Affidavit.

UNITED STATES OF AMERICA,
District of Alaska, ss:

MARY DICKSON, being first duly sworn, deposes and says:

That she resides in the city of Alameda, county of Alameda, State of California; that she is a sister of the defendant Fitzpatrick, and has known him ever since he was born; that of deponent's own knowledge and belief the said defendant has always heretofore borne a good reputation and character in the community where he has lived; that during a very large proportion of his life the said defendant has resided in the city of San Francisco, State of California; that he has been in the
38 employ of the Pacific Coast Steamship Company as a fireman on board several different steamers, including the "Queen" and the "City of Puebla," and that for three years last past he has been in the employ of the White Lumber Company, on the steamer "Whitesboro," running between Mendicino County and San Francisco; that the general character and reputation of the said defendant has always been good as a peaceable, industrious, and law-abiding citizen, and that if an opportunity is offered the defendant by a continuance of this cause until such time as

his witnesses can be produced upon the trial the defendant will be able to prove his said good character and reputation by the following witnesses:

James Madison, secretary of the Pacific Coast Marine Firemen's Union, who resides at San Francisco, California;

Edward Lanigan, formerly assistant collector of internal revenue at San Francisco, California;

James Phelan, mayor of San Francisco, California;

George Warren, an employe of the White Lumber Company, and an expert lumber tallier, of San Francisco, California;

John Cardinal, engineer for the Pacific Union Club, San Francisco, California; and

Judge Troutt, one of the superior court judges of San Francisco, California.

All of whom are acquainted with the said defendant's reputation and character in the city of San Francisco, where he has resided for many years last past; that the said defendant did not come to Alaska until the month of August last, and has only resided within the said Territory from that time until the present time, and that the said defendant came to Alaska for the purpose of going into the Klondike country, but owing to the number of persons crossing the trail he was not able to get over with his supplies, and, in consequence, was obliged to return and
39 did return to San Francisco in the month of October, 1897, returning to Alaska in December, 1897, and was at Dyea en route for the Yukon at the time of his arrest.

MARY DICKSON.

Subscribed and sworn to before me, this 26th day of May, A. D. 1898.

A. K. DELANEY,
Notary Public for Alaska.

(Endorsed:) No. 819. U. S. district court. United States vs. Fitzpatrick et al. Affidavit of Mary Dickson. Filed May 31, 1898. Albert D. Elliot, clerk. Arthur K. Delaney, att'y for Fitzpatrick.

40 And afterwards, to wit, on the 26th day of May, A. D. 1898, the further proceeding was had, which is in words and figures following, to wit:

No. 819.

In the United States district court for the district of Alaska.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN FITZPATRICK, HENRY BROOKS, AND WILLIAM CORBETT, DEFENDANTS. } Affidavit.

UNITED STATES OF AMERICA,
District of Alaska, ss:

JOHN FITZPATRICK, being first duly sworn, deposes and says:

That he is one of the defendants in the foregoing action, and that he has heard read the affidavit of Mary Dickson and knows the contents thereof,

and that the same is true, as he verily believes; that the testimony of the witnesses set forth in the affidavit of Mary Dickson aforesaid is material, and of the very highest importance to this defendant, as he is advised by his counsel, A. K. Delaney, and verily believes that his reputation and character as a peaceable, good, and law-abiding citizen in the
11 community he has resided since childhood, to wit, the city of San Francisco, California, can be established by the witnesses named in the affidavit of the said Mary Dickson, and by many others who are acquainted with the defendant and his said reputation; that he cannot safely proceed to the trial of this cause without the said witnesses, and that he believes that if this cause be continued over the present term of this court he will be able to procure the attendance of the said witnesses in his behalf at the next term of the court; that owing to the infrequency of communication between Sitka and San Francisco it has not been possible for this deponent to procure the said witnesses since the indictment herein was filed.

J. F. FITZPATRICK.

Subscribed and sworn to before me this 26th day of May, 1898.

A. K. DELANEY,
Notary Public for Alaska.

(Endorsed:) No. 819. U. S. district court, district of Alaska. United States vs. Fitzpatrick et al. Affidavit of John Fitzpatrick. Filed May 31, 1898. Albert D. Elliot, clerk. Arthur K. Delaney, attorney for Fitzpatrick.

12 [Tuesday, May 31, 1898. Journal, page 543.]

UNITED STATES, PLFF., *vs.* JOHN FITZPATRICK, HENRY BROOKS, and William Corbett.	No. 819.

Now, at this day, on motion of C. S. Blackett, and all of the above-named defendants being also present in person, it is ordered that defendants Henry Brooks and William Corbett have separate trials.

Whereupon the U. S. attorney moved the trial of John Fitzpatrick, one of the above-named defendants, for this hour, to be followed by the trial of William Corbett, which motion was allowed by the court, defendants duly excepting.

13 [Tuesday, May 31, 1898. Journal, page 544.]

UNITED STATES, PLFF., *vs.* JOHN FITZPATRICK, DEFT.	No. 819.

Now comes the plaintiff by Burton E. Bennett, esq., U. S. attorney, and the defendant being present in person and by A. K. Delaney, esq., his counsel, and this cause coming on for trial, the clerk proceeds to call the venire of the petit jury under the direction of the court, and the jurors were sworn as to their qualifications, and being passed for cause

by the plaintiff and defendant, the following jurors were sworn to try the issues, viz:

Willis Nowell, James Brightman, Wm. Shergan, Joseph French, L. A. Moore, William Millow, Luther Schooling, Fred Hoyt, Wm. B. Brightman, Chas. Crawford, E. E. Bertram, John McWilliams.

Ranson E. Tuttle was sworn as bailiff and put in charge of the jurors now qualified.

On the request of counsel, all witnesses in this cause, except witnesses testifying, were excluded from the court room.

John K. Ross, Dr. Thomas L. Price, T. Brenan, John Lewis Brook, Leroy W. Taylor, Phillip Ballard, C. Dall, John Cudihee, were sworn on the part of plaintiff to tell the truth in this cause. Arthur G. Shoup was sworn as additional bailiff, and there not being sufficient time to conclude the testimony, this case is ordered to be and is hereby continued until to-morrow morning at 9.30 o'clock.

44 [Wednesday, June 1, 1898. Journal, page 547.]

UNITED STATES, PLFF., *vs.* JOHN FITZPATRICK, DEFT. } No. 819.

Comes again the plaintiff by Burton E. Bennett, U. S. attorney, and the defendant John Fitzpatrick being present in person and by his counsel, also the jury heretofore empaneled herein who are called by the clerk, and all being present, the trial of this cause proceeded.

J. K. Ross was recalled for cross-examination by defendant, plaintiff having withdrawn its rest for that purpose and by leave of court; whereupon plaintiff rests.

The following-named persons were sworn to testify on behalf of defendant John Fitzpatrick are Edward de Groff. Whereupon defendant rests his case.

J. W. Snook, J. M. T. Young, and Dr. S. S. White were called and sworn for plaintiff on rebuttal.

The evidence being heard, the cause was argued by counsel, the plaintiff being represented by Burton E. Bennett, U. S. attorney, and the defendant by A. K. Delaney.

Thereupon the jury was instructed by the court and retired for deliberation in charge of their sworn baliffs.

The jury in the above-entitled cause have came into court, and being called by the clerk, and all being present and answering to their names, and also the defendant and his counsel, the jury returned the following verdict, viz:

45 And afterwards, to wit, on the 1st day of June, A. D. 1898, the further proceeding was had, which is in words and figures following, to wit:

The defendant asks the court to give the following instructions to the jury:

1. In this case the defendants are jointly indicted, and in order to sustain a conviction it is necessary for the Government to establish a

common design, or intent, or purpose by two or more of the defendants to commit murder, or some other felony, or were actually engaged in such attempt, and this constitutes, or is, the essence of the charge of a conspiracy, and this common design, or actual participation, must be proved in order to warrant a conviction, either by direct evidence or by the proof of such circumstances as naturally tend to prove it, and sufficient in themselves to satisfy the jury of the existence of such common design, or actual participation, beyond a reasonable doubt, unless you shall find beyond a reasonable doubt that the defendant wantonly shot and killed deceased without excuse or justification. [Given as modified.]

2. Where a common design is sought to be established by circumstantial evidence, such circumstantial evidence must be of a character such as will exclude every reasonable hypothesis other than that the defendant is guilty, and in order to establish guilt by circumstantial evidence alone the Government must show that the alleged facts and circumstances are true, and must further show to the satisfaction of the jury, beyond a reasonable doubt, that such facts and circumstances are incompatible upon any reasonable hypothesis with the innocence of the accused, and incapable of any explanation upon any reasonable hypothesis other than that of the guilt of the accused. In other words, to warrant a conviction upon circumstantial evidence, the circumstances must
46 not only be in harmony with the guilt of the accused, but they must be of such a character that they can not reasonably be true in the ordinary nature of things and the defendant be innocent. They must be not only consistent with the prisoner's guilt, but they must be consistent with any other rational conclusion or hypothesis, and such as to leave no reasonable doubt in the minds of the jury of the defendant's guilt. But you have a right to consider any direct testimony also which may have been introduced. [Given as modified.]

3. If there is any one single fact proved to the satisfaction of the jury by a preponderance of evidence which is inconsistent with defendant's guilt this is sufficient to raise a reasonable doubt, and the jury must acquit the defendant. [Given.]

4. You are instructed that the law presumes the defendant innocent in this case and not guilty, as charged in the indictment, and this presumption should continue to prevail in the minds of the jury until you are satisfied by the evidence beyond all reasonable doubt of the guilt of the defendant; and, acting on this presumption, the jury should acquit the defendant unless constrained to find him guilty by the evidence convincing them of such guilt beyond a reasonable doubt. [Given.]

5. You are instructed that under the law no jury should convict a citizen, or citizens, of crime upon mere suspicion, however strong, or simply because there is a preponderance of evidence in the case against him, or them, or simply because there is a strong reason to suspect that he, or they, is, or are, guilty, but before the jury can lawfully convict you must be convinced of such guilt on the part of the defendant beyond all reasonable doubt. The presumption of innocence is not a mere form to be disregarded by the jury at pleasure, but it is an essential, substantial part of the law of the land binding upon you in this case, and it is the duty of the
47 jury to give the defendant in this case the full benefit of this presumption and acquit him, unless they feel constrained to find him

guilty as charged by the law of the land and the evidence in the case convincing them of the defendant's guilt, as charged, beyond a reasonable doubt. [Given.]

6. You are further instructed upon the question of identity that to justify the conviction of this defendant, his identity as the guilty person, or one of the guilty persons, must be proved beyond every reasonable doubt, and you are not bound to believe that any witness was or were able to identify the defendant with certainty because he or they swore positively to such identity; and you should not so believe, if you yourselves are satisfied from the circumstances proved that there is reasonable doubt as to whether the witnesses were able to and did identify the defendant as the guilty person, or one of them. [Given.]

7. You are also further instructed that in all criminal trials where the prosecution depends upon circumstantial evidence which is not conclusive in its character, previous good character on the part of the defendant, if proved, is entitled to great weight in favor of innocence, and where there is a serious conflict in the testimony as to the commission of an offense like that charged in this case, evidence of the previous good character of the defendant should be considered by the jury in connection with all other evidence given on the trial in determining whether the defendant would be likely to commit, or did commit, the offence in question; that in doubtful cases evidence of good character is conclusive in favor of the party accused, and if from the evidence you find that the facts and circumstances proved and relied upon to establish the defendant's guilt are in doubt, or that the intention of the defendant to commit the crime is in doubt, then if the prisoner has by evidence satisfied you that he was a man of good character up to the time of the alleged offense in
48 this case, the presumption of law is that the alleged crime is so inconsistent with the former life and character of the defendant that he could not have intended to commit such a crime, and it would be your duty to give the defendant the benefit of that presumption and acquit him. [In the margin the word "refused" is written.]

8. And in this case, if you believe from the evidence that prior to the commission of the alleged crime the defendant had always borne a good character among his acquaintances and in the neighborhood where he lived, then this is a fact properly to be considered by you with all the other evidence in the case in determining the question whether the witnesses who have testified to facts tending to criminate him have been mistaken, or have testified falsely, or truthfully, and if, after a grave consideration of all of the evidence in the case, including that bearing upon his previous good character, you entertain any reasonable doubt of the defendant's guilt, it is your duty to acquit him. [Given.]

9. You are further instructed upon this question of good character that the effect of the Government's admission that the witnesses set forth in the affidavit of Mary Dickson, and referred to in the affidavit of the defendant upon his motion for a continuance of this cause over the term, is to place before you evidence of the good character of the defendant prior to the homicide in this case in just the same manner and with the same effect as would be the case if the witnesses mentioned in such affidavits were present in court and had testified to the defendant's good character as set forth in said affidavits. [Given.]

10. You are further instructed that the same rule of law, as above stated, applies to the affidavit made by the defendants, Corbett and Brooks, for a continuance over the term in their behalf, and you will consider the admission of the Government in that regard as having the same effect as the testimony of said witnesses would have in case they were present in court. [Given.]

49 11. If you are satisfied from the evidence that the defendant was not at the cabin of the deceased Roberts when the homicide took place, the defendant is entided to be acquitted, and in deciding this question you have the right to take into consideration the admission of the Government that the witnesses named in the affidavit of Corbett and Brooks would, if present, testify as in said affidavit set forth, and you have also the right to consider the testimony of the defendant as to that matter in connection therewith. [Given.]

(Endorsed:) No. 819. U. S. dist. court, Dist. of Alaska. United States vs. Fitzpatrick et al. Instructions asked by defendant Fitzpatrick. (Given as modified.) Filed June 1, 1898; Albert D. Elliot, clerk.

50 And afterwards, to wit, on the first day of June, 1898, the further proceeding was had, which is in words and figures following, to wit:

In the United States district court for the district of Alaska.

THE UNITED STATES OF AMERICA)
vs.
JOHN FITZPATRICK.)

GENTLEMEN OF THE JURY: The defendant, John Fitzpatrick, is charged by the indictment in this case, jointly with Henry Brooks and William Corbett, of the crime of murder by having unlawfully, wilfully, feloniously, purposely, and of deliberate and premeditated malice shot and killed one Samuel Roberts on the 13th day of March, 1898, at or near Dyea, within the district of Alaska, and within the jurisdiction of this court. Henry Brooks and William Corbett having demanded and the court having granted them separate trials, the defendant, John Fitzpatrick, alone is now being tried.

Murder is usually defined as follows: When a person of sound memory unlawfully and feloniously kills a human being, under the peace of the United States, with malice aforethought, either express or implied, such slayer is guilty of murder. It is also murder where one human being kills another, in the peace of the United States, while such slayer is attempting to commit the crime of robbery or burglary.

The chief characteristic of the crime of murder is malice prepense or aforethought. And it is indispensible that this malice be proved.

51 The term malice aforethought, however, is not restricted to spite or malevolence towards the deceased in particular, but it is understood to mean that general malignity and recklessness of the lives and personal safety of others which proceed from a heart void of a just sense of social duty and fatally bent on mischief. And whenever the fatal act is committed deliberately or without adequate provocation, the law presumes it was done with malice. So where the fatal act was done while

the slayer was attempting to commit the crime of robbery or burglary, and in pursuance of said unlawful attempt, the law presumes malice.

Malice is either expressed or implied. Express malice exists when the party evinces an intention to commit the crime. It is proved by evidence of a deliberately formed design to kill another, and such design may be shown from the circumstances attending the act, such as the deliberate selection and use of a deadly weapon, knowing it to be such.

Implied malice is an inference or conclusion of law upon the facts found by the jury. When a man commits an act unaccompanied by any circumstances justifying its commission the law presumes he has acted advisedly and with an intent to produce the consequences which have ensued. And therefore the intent to kill is conclusively inferred from the deliberate, violent use of a deadly weapon. It is a well-established rule of law that every person is presumed to contemplate the ordinary and natural consequences of his own acts. Malice is also proven when it is shown that the slayer was lying in wait for the deceased at the time the homicide was committed, with the intent to kill the deceased or commit some other felony.

This malice or criminal intention to take the life of another must exist in the mind of the slayer at the moment he committed the overt act
52 resulting in the death of another. In other words, the malicious intent and overt act must be coexistent. But this malice or criminal intention to take life may have existed in the mind of the slayer only for a moment before committing the act resulting in death. The length of time which the mind of the slayer has been in this condition or state of malice, or length of time within which the criminal intention to take life has existed, makes no difference as to the degree or grade of the crime. If it is present in the mind of the slayer when the overt act is done, and such act is done without provocation, excuse, or justification, and in cool blood, the crime is murder.

It is the theory of the prosecution that the defendant, John Fitzpatrick, and Henry Brooks and William Corbett were jointly engaged in an unlawful attempt to rob the deceased Samuel Roberts. If you find from the evidence beyond a reasonable doubt that the defendant, John Fitzpatrick, and the said Brooks and Corbett had conspired to rob the deceased, and were actually engaged in the attempt to commit such robbery, and you shall further find that in attempting to carry out such unlawful object any one of the defendants shot and killed the deceased, then the defendant, John Fitzpatrick, is guilty. For, if two or more persons conspire to do an unlawful act and death happens in the prosecution of the common object, all are alike guilty of homicide.

The law, however, presumes every man to be innocent until he is proved to be guilty. It devolves upon the Government to prove the defendant guilty. To do so in this case the prosecution must prove to your satisfaction beyond a reasonable doubt every fact necessary to constitute the crime of either murder or manslaughter.

Not every doubt is a reasonable one. It is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is not a
53 mere captious, speculative, imaginary, or chimerical doubt. Nor is the jury allowed to create sources or materials of doubt by

resorting to trivial and fanciful suppositions or remote conjectures as to the possible status of the case different from that established by the evidence. You are not at liberty to disbelieve as jurors if from the evidence you believe as men; your oath imposes on you no obligation to doubt when no doubt would exist if no oath had been administered. A reasonable doubt is such a condition of the mind resulting from the consideration of the evidence before you as makes it impossible for you as reasonable men to arrive at a satisfactory conclusion. It is not a consciousness that a conclusion arrived at may possibly be erroneous, but such a state of mind as deprives you of the ability to reach a conclusion that is satisfactory. You are the sole and exclusive judges of the facts; and if, after considering all the evidence, you can conscientiously say that you have an abiding conviction of the truth of the charge you are then satisfied beyond a reasonable doubt.

It is your duty to consider the entire testimony presented, whether upon behalf of the plaintiff or the defendant, and whether said testimony be direct or what is called circumstantial; and you will give to all of the testimony just such consideration and weight as you think it merits. You are to determine the credibility of the witnesses who have testified, and to that end you have the right to consider their appearance upon the stand; their manner of testifying, their apparent candor in giving their testimony, or the want of such candor; the probable or improbable character of the story which they tell; the interest, if any, which any of them may have in the result of this trial; and from all the evidence in the case and all the circumstances surrounding it, as disclosed by the evidence, determine what the truth is. The prosecution having admitted that certain persons named in the defendant's affidavits filed in this
54 cause for a continuance would testify, if present, to the several matters and things in said affidavits set forth, you have a right to take such testimony into consideration the same as if it had been given from the witness stand, giving it just such weight as you deem it entitled to, under the same rules given you for the consideration of other testimony.

The defendant having put in issue his former good character, you have a right to consider all the testimony introduced by either the plaintiff or defendant touching his reputation or character. But it matters not how good a reputation and character the defendant may have sustained, if you are convinced beyond a reasonable doubt of his guilt in this case, his former good character will not exonerate him. The good character of the accused is permitted in evidence for the purpose of showing the improbability of his having committed the crime.

The penalty for the crime of murder in this district is death, unless the jury shall qualify their verdict as hereinafter stated; and there are no degrees of murder under the law of this district. But if you find the defendant guilty of murder, you may, if you so desire, qualify your verdict by adding thereto the words "without capital punishment," and if you so qualify and return your verdict, the defendant will be sentenced to imprisonment at hard labor for life.

But if you shall fail to find the defendant guilty of murder, either with or without the above qualification, you may, under the law of this district, find him guilty of manslaughter, if the evidence so warrants. Manslaughter is the unlawful killing of a human being by another human

being without excuse or justification, but without malice, express or implied. The Revised Statutes of the United States, which is the law of this district applicable to this case, defines manslaughter as follows: "Every person who unlawfully, and wilfully, and without malice strikes, stabs,
55 wounds, or shoots at, or otherwise injures another, of which striking, stabbing, wounding, shooting, or other injury such other person dies, either on land or on sea, within or without the United States, is guilty of the crime of manslaughter." So, in this case, if you find from all the evidence beyond a reasonable doubt that the defendant, at the time and place in the indictment charged, unlawfully and wilfully, but without malice, express or implied, under the law as I have heretofore given it to you on that subject, shot and killed the deceased, then the crime is manslaughter.

Upon retiring to your jury room for deliberation you will select a foreman, and when you have agreed upon your verdict you will so notify your bailiff and return your verdict to the court.

Your verdict in this case should be guilty of murder, or guilty of murder followed by the words "without capital punishment," or guilty of manslaughter, or not guilty, as you shall find the facts under all the evidence and circumstances of the case as disclosed thereby, and under the law as it has been given you by the court.

(Endorsed:) No. 819. Instructions. U. S. vs. Fitzpatrick. Filed Jun. 1, 1898. Albert D. Elliot, clerk.

56 And afterwards, to wit, on the first day of June, A. D. 1898, the further proceeding was had, which is in words and figures following, to wit:

THE UNITED STATES OF AMERICA,
District of Alaska:

In the district court of the United States for the district of Alaska.

THE UNITED STATES OF AMERICA
vs.
JOHN FITZPATRICK. } Verdict. May term, 1898.

We, the jury, empaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the indictment, without capital punishment.

L. A. MOORE, *Foreman.*

Whereupon the jury are discharged by the court from further attendance in this cause.

(Endorsed:) No. 819. United States of America vs. John Fitzpatrick. Indictment for murder. Verdict. Filed Jun. 1, 1898. Albert D. Elliot, clerk.

57 And afterwards, to wit, on the 2nd day of June, A. D. 1898, the further proceeding was had, which is in words and figures following, to wit:

No. 819.

In the United States district court for the district of Alaska.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN FITZPATRICK, DEFENDANT. } Motion.

Now, on this second day of June, A. D. 1898, comes the defendant and moves the court to set aside the verdict herein and grant a new trial, for the following causes, materially affecting the substantial rights of the said defendant:

I.

Irregularity in the proceedings of the court, and of the jury, and of the adverse party, and irregularity in the orders of the court during the trial, and the abuse of discretion on the part of the court by which this defendant was prevented from having a fair trial.

58

II.

Misconduct on the part of the jury and the plaintiff.

III.

Accident and surprise which ordinary prudence on the part of the defendant could have guarded against.

IV.

Newly discovered evidence material for the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial.

V.

Insufficiency of the evidence to justify the verdict, and that such verdict is against the law.

VI.

Errors in law occur'ing at the trial and excepted to by the defendant.

ARTHUR K. DELANEY,
Attorney for Defendant Fitzpatrick.

(Endorsed:) No. 819. U. S. District Court. U. S. of America vs. John Fitzpatrick. Motion. Filed June 2, 1898. Albert D. Elliot, clerk. A. K. Delaney, att'y. for deft.

59–60 And afterwards, to wit, on the third day of June, A. D. 1898, the further proceeding was had, which is in words and figures following, to wit:

In the United States district court for the district of Alaska.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN FITZPATRICK, DEFENDANT. } Affidavit.

UNITED STATES OF AMERICA,
District of Alaska, ss:

F. D. KELSEY, being first duly sworn, deposes and says:

That he is a stenographer and shorthand reporter, and by order of the court in this action took the testimony stenographically of the witnesses and the proceedings of the court in the trial of this action, and also in the trial of the case of The United States vs. Corbett and Brooks, who were indicted with the defendant, Fitzpatrick, jointly, and who were tried subsequently to the trial of the defendant, Fitzpatrick; that upon the trial of the defendant, Fitzpatrick, the Government called a witness named Charles Dall in behalf of the prosecution, and that upon the cross-examination of said witness by Mr. Delaney, counsel for the defendant,
61 Fitzpatrick, the said witness testified as follows:

"Q. Was it a dark night?

"A. No, sir; not very.

"Q. Moonlight?

"A. Well, the moon shone out amongst the clouds occasionally."

That upon the trial of Corbett and Brooks the said witness was also called on behalf of the prosecution, and that upon cross-examination by Mr. Blackett, on behalf of the defendants, he testified upon said last-mentioned trial as follows:

"Q. Did you see the moon that night?

"A. Once in a while I saw the light between the clouds.

"Q. Didn't you testify you saw the moon several times in the last trial? Didn't you testify to that state of facts?

"A. I thought it was the moon. I saw a light between the clouds.

"Q. And you are willing to testify to this jury, Mr. Dall, you didn't so state at Fitzpatrick's trial that you saw the moon at all?

"A. I don't think I testified to that. I could not swear. I saw the light in the clouds and took it to be the moon.

"Q. Didn't you testify that you saw the moon several times that night?

"A. I said I thought I saw the moon.

"Q. Didn't you testify that you did see it?

"A. I didn't testify that I did see it."

F. D. KELSEY.

Subscribed and sworn to before me this third day of June, A. D. 1898.

A. K. DELANEY,
Notary Public for Alaska.

62 (Endorsed:) No. 819. U. S. district court, district of Alaska. United States agst. John Fitzpatrick. Affidavits on motion for new trial. Filed Jun' 4, 1898; Albert D. Elliot, clerk. Arthur K. Delaney, defts. atty.

63 And afterwards, to wit, on the third day of June, A. D. 1898, the further proceeding was had, which is in words and figures following, to wit:

In the United States district court for the district of Alaska.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN FITZPATRICK, DEFENDANT. } Affidavit.

UNITED STATES OF AMERICA,
District of Alaska, ss:

ROSWELL SHELLEY, being first duly sworn, deposes and says:

That he is receiver of the local land office at Sitka, Alaska; that he is acquainted with J. Montgomery Davis and Willis Nowell, the former of whom is the foreman of the grand jury for the present term of this court, and the latter one of the petit jurors; that before the trial of the defendant, Fitzpatrick, herein this deponent was engaged in conversation with the said J. Montgomery Davis, at which the said Willis Nowell was present and several other parties, which said conversation took place on the sidewalk in front of the building now occupied as a land office, and was principally carried on between this deponent and the said Davis, and that in said conversation, in the presence of the said Willis Nowell, the said J. Montgomery Davis stated, in speaking about the case of the United States against Fitzpatrick, that there would be no trouble about a
64 conviction in that case, as the evidence was perfectly clear and conclusive, and that the Government had got the right man; that this conversation grew out of the fact that this deponent stated that some one was now incarcerated here in Sitka who had been sent from Dyea and was held without a complaint having been filed against him, and that this remark led up to the above conversation.

ROSWELL SHELLEY.

Subscribed and sworn to before me this third day of June, A. D. 1898.

A. K. DELANEY,
Notary Public for Alaska.

(Endorsed:) No. 819. U. S. district court, district of Alaska. United States ag-t. John Fitzpatrick. Affidavits on motion for new trial. Filed Jun' 4, 1898; Albert D. Elliot, clerk. Arthur K. Delaney, defts. atty.

65 And afterwards, to wit, on the 4th day of June, A. D., 1898, the further proceeding was had, which is in words and figures following, to wit:

In the United States district court for the district of Alaska.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN FITZPATRICK, DEFENDANT. } Affidavit.

UNITED STATES OF AMERICA, *District of Alaska, ss:*

A. K. DELANEY being duly sworn, deposes and says:

That he is the attorney for the defendant in the above-entitled action; that upon the trial of the defendant herein, and upon the trial of the

defendants Brooks and Corbett, who were jointly indicted with the defendant Fitzpatrick, the attorney for the United States advanced in either case two separate, inconsistent, and contradictory theories as to the homicide in the case, and argued the same to the jury in each case; that in the trial of the case against Fitzpatrick the said district attorney asserted to the jury, and insisted before them as the Government theory of the case, that the mortal wound was inflicted upon the deceased Roberts by a pistol in the hands of the defendant Fitzpatrick, and
66 that subsequently upon the trial of the case of Corbett and Brooks he advanced and argued to the jury the theory of the Government that the mortal wound had been inflicted by Corbett; that from all the evidence in the case it is impossible for both of those statements to be true, and, as an examination of the evidence will disclose, the one is contradictory to the other, and must have misled the jury in one or the other case; that the said district attorney also, in his argument to the jury, insisted, contrary to well-known astronomical and scientific facts, that the moon rises at the same hour in San Francisco as it does at Sitka and Dyea; that the longitude of San Francisco is about one hundred and twenty degrees west (120° W.) from Greenwich; and that the longitude of Sitka, Alaska, which is, approximately, that of Dyea, is one hundred and thirty-five degrees and seventeen minutes west (135°17′ W.) from the meridian of Greenwich, and that, consequently, there is an hour's difference between the time at San Francisco and the time at Sitka and Dyea, approximately, and that, therefore, the moon rises one hour later in that vicinity—Sitka and Dyea—than it does at San Francisco; that this statement of the attorney for the United States, being contrary to well-known astronomical and scientific facts, was misleading to the jury, and unquestionably prejudicial to the defendant, Fitzpatrick.

That this deponent is informed, as will appear by the affidavit of Roswell Shelley, hereunto annexed, that the juryman Willis Nowell, who sat as one of the twelve (12) in this case, must have overheard certain conversations and statements made by the foreman of the grand jury at this term, J. Montgomery Davis, and occurring prior to the trial of Fitzpatrick, in which the said Davis asserted in the most emphatic manner, in the presence of the said Nowell and Shelley, the guilt of the defendant; that the said Nowell and Davis are extremely intimate, and, as is
67 universally known by all who are acquainted with them, on terms of the greatest intimacy and personal friendship, and during the present session of the court, at Sitka, have been together a great deal; in fact, almost constantly, except when in the performance of their respective duties as grand and petit jurors; that subsequently, when called as a juror in the trial of said cause, the said Willis Nowell, in answer to interrogatories propounded by the district attorney touching the qualifications of the said Nowell to sit as juror in the case, the said Nowell stated that he had had no conversation about the matter and knew nothing about the case, and was, thereupon, without further interrogatories, permitted to sit as a juror in the case, and that for these reasons this deponent believes that said Willis Nowell was not a fair and unbiased juror qualified to sit on the case, and that these facts were not known to either the defendant or his counsel at the time the jury was empaneled.

A. K. DELANEY.

Subscribed and sworn to before me this 4th day of June, 1898.

[SEAL.] ALBERT D. ELLIOT,
Clerk U. S. Dist. Ct. for Alaska.

(Endorsed:) No. 819. U. S. district court, district of Alaska. United States agst John Fitzpatrick. Affidavits on motion for new trial. Filed Jun. 4, 1898. Albert D. Elliot, clerk. Arthur K. Delaney, deft's atty.

68 And afterwards, to wit, on the fourth day of June, A. D. 1898, the further proceeding was had, which is in words and figures following, to wit:

In the United States district court for the district of Alaska.

THE UNITED STATES OF AMERICA, PLAINTIFF,)
vs.
JOHN FITZPATRICK, DEFENDANT.)

Now, on this fourth day of June, 1898, comes the defendant and excepts to the charge of the court as follows:

1. The defendant excepts to the modification of his first instruction as asked, which said modification is added to said first request, and is in the following words: "Unless you shall find beyond a reasonable doubt that the defendant wantonly shot and killed the deceased without excuse or justification."

2. The defendant excepts to the action of the court refusing the seventh instruction asked for by the defendant, whish is in words and figures as follows:

"7. You are also further instructed that in all criminal trials where the prosecution depends upon circumstantial evidence which is not conclusive in its character, previous good character on the part of the defendant, if proved, is entitled to great weight in favor of innocence,
69 and where there is a serious conflict in the testimony as to the commission of an offense like that charged in this case, evidence of the previous good character of the defendant should be considered by the jury in connection with all other evidence given on the trial in determining whether the defendant would be likely to commit, or did commit, the offense in question; that in doubtful cases evidence of good character is conclusive in favor of the party accused, and if from the evidence you find that the facts and circumstances proved and relied upon to establish the defendant's guilt are in doubt, or that the intention of the defendant to commit the crime is in doubt, then if the prisoner has by evidence satisfied you that he was a man of good character up to the time of the alleged offense in this case, the presumption of law is that the alleged crime is so inconsistent with the former life and character of the defendant that he could not have intended to commit such a crime, and it would be your duty to give the defendant the benefit of that presumption and acquit him."

3. The defendant excepts to that portion of the charge of the court which relates to manslaughter, and is in words as follows:

"But if you shall fail to find the defendant guilty of murder, either with or without the above qualification (referring to capital punishment),

you may, under the law of this District, find him guilty of manslaughter, if the evidence so warrants. Manslaughter is the unlawful killing of a human being by another human being without excuse or justification, but without malice, express or implied. The Revised Statutes of the United States, which is the law of this District applicable to this case, defines manslaughter as follows:

Every person who unlawfully and wilfully, and without malice, strikes, stabs, wounds, or shoots at, or otherwise injures another, of which
70 striking, stabbing, wounding, shooting, or other injury such other person dies, either on land or on sea, within or without the United States, is guilty of the crime of manslaughter. So in this case, if you find from all the evidence beyond a reasonable doubt that the defendant, at the time and place in the indictment charged, unlawfully and wilfully, but without malice express or implied, under the law as I have heretofore given it to you on that subject, shot and killed the deceased, then the crime is manslaughter."

ARTHUR K. DELANEY,
Deft's Atty.

(Endorsed:) No. 819. U. S. dist. court, district of Alaska. U. S. vs. Fitzpatrick. Deft's exceptions to charge to jury. Filed June 4th, 1898. Albert D. Elliot, clerk.

71 And afterwards, to wit, on the 6th day of June, 1898, the further proceedings was had, which is in words and figures following, to wit:

In the United States district court for the District of Alaska.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* JOHN FITZPATRICK, DEFENDANT. } Affidavit.

UNITED STATES OF AMERICA,
District of Alaska, ss:

J. MONTGOMERY DAVIS, being first duly sworn, deposes and says: That he is the same person named in the affidavits of Roswell Shelley and A. K. Delaney, on file in this case; that the said Shelley is the same Roswell Shelley who was written up in one of the leading papers on the Pacific coast a short time ago, and about which our citizens are more or less familiar to wit, the Daily Oregonian, of Portland, Oregon; that the said Shelley is the same Roswell Shelley who got into a fight in Skagway, Alaska, a short time ago; that the said Roswell Shelley comes from Oregon; that he never had a conversation with said Shelley in the presence of Willis Nowell at all, either in regard to said Fitz-
72 patrick case or otherwise; that he never had but one conversation with said Shelley in regard to said case, and that took place during the progress of the trial thereof, on the veranda of the courthouse, when he called me aside and said: "I have been taken to task for being in the company of Fitzpatrick's sister and brother, and a prominent society person told me that I ought not associate with the sister and brother of a murderer. I told the society person that if anyone took

exception of my way of doing things they could go plumb to hell." I then told Shelley that I considered it wrong for any person to say that to him, and that as Fitzpatrick was not yet convicted, the statement that he was associating with the brother and sister of a murderer was premature, to say the least. This affiant further says that he does not know what the object of said Shelley was to call him aside simply to tell him as aforesaid, and to talk to him in regard to said case.

J. MONTGOMERY DAVIS.

Subscribed and sworn to before me, this 6th day of June, 1898.

[SEAL.] ALBERT D. ELLIOT,
Clerk U. S. Dist. Ct., Alaska.

(Endorsed:) Original. No. 819. In the United States district court for the district of Alaska. United States of America, plaintiff, vs. John Fitzpatrick, defendant. Affidavit of J. Montgomery Davis. Filed June 6, 1898. Albert D. Elliot, clerk. Due service is hereby admitted June 6/98, A. K. Delaney, dft's atty.

73 And afterwards, to wit, on the sixth day of June, A. D. 1898, the further proceeding was had, which is in words and figures following, to wit:

In the United States district court for the district of Alaska.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN FITZPATRICK, DEFENDANT. } Affidavit.

UNITED STATES OF AMERICA, *District of Alaska, ss:*

WILLIS NOWELL, being first duly sworn, deposes and says that he is the same person named in the affidavits of Roswell Shelley and A. K. Delaney on file in this case; that he is a petit juror of the present term of this court; that at no time during the present term of this court was he present when a conversation was had between said Roswell Shelley and J. Montgomery Davis, and that he never heard said Davis state to said Shelley in speaking about the case of the United States against Fitzpatrick, or at all, that "there would be no trouble about a conviction in that case, as the evidence was perfectly clear and conclusive and that the Government had got the right man" or words of like effect, or any words in regard to said case.

WILLIS E. NOWELL.

Subscribed and sworn to before me this 6 day of June, 1898.

[SEAL.] ALBERT D. ELLIOT,
Clerk U. S. Dist. Ct., Alaska.

74 (Endorsed:) Original. No. 819. In the United States district court for the district of Alaska. United States of America, plaintiff, vs. John Fitzpatrick, defendant. Affidavit of Willis Nowell. Filed Jun' 6, 1898. Albert D. Elliot, clerk. Due service is hereby admitted June 6/98. A. K. Delaney, defts. att'y.

74½ [Saturday, June 4, 1898. Journal, page 564.]

UNITED STATES, PLFF.,
vs.
JOHN FITZPATRICK, DEFT.

Now comes the plaintiff, by Burton E. Bennett, U. S. attorney, and the defendant, in person and by A. K. Delaney, his counsel, and defendant's motion for a new trial in this cause coming on to be heard upon the affidavits of F. D. Kelsey, Roswell Shelley, and A. K. Delaney, and being argued by counsel, and the court not being sufficiently advised takes the same under advisement, granting to attorney for plaintiff the right to file counter affidavits herein if he shall deem it advisable.

It is further ordered by the court that F. D. Kelsey, esq., the stenographer in this case, reduce the testimony taken by him herein into longhand and place on file with the clerk of this court, and also furnish a carbon copy for the U. S. attorney.

[Monday, June 6, 1898. Journal, page 567.]

UNITED STATES, PLFF.,
vs. No. 819.
JOHN FITZPATRICK, DEFT.

Comes now the plaintiff, by Burton E. Bennett, U. S. attorney, and the defendant in person and by A. K. Delaney, his counsel, and the motion to strike from the affidavit of J. M. Davis coming on to be heard and being argued by counsel, and the court being sufficiently advised in the premises,

It is ordered that all that portion of said affidavit commencing with the word "that," line three, word eleven, and ending with the
75 word "Oregon," in line nine, interlined, be stricken out.

The motion for a new trial heretofore made herein and taken under advisement also now coming on to be heard, and the court being sufficiently advised in the premises,

It is ordered that said motion be, and the same is hereby, denied, defendant duly excepting.

Defendant thereupon filed his motion in arrest of judgment, which is denied by the court, defendant duly excepting.

[Monday, June 6, 1898. Journal, pages 567 and 568.]

UNITED STATES, PLFF.,
vs. No. 819.
JOHN FITZPATRICK, DEFT.

Comes now the plaintiff by Burton E. Bennett, U. S. attorney, and the defendant in person and by A. K. Delaney, his counsel, the jury empaneled and sworn herein having returned a verdict of guilty as charged in the indictment "without capital punishment," and defendant appearing for judgment and being asked by the court if he knew of any reason why the judgment of the court should not be rendered against him, said that he did not.

Thereupon, the court rendered its judgment—

That whereas, the said John Fitzpatrick, having been convicted in this court of the crime of murder, "without capital punishment,"

76 The judgment and sentence of the court is that you, John Fitzpatrick, be imprisoned, at hard labor, in the penitentiary at San Quentin, in the State of California, for the full period of your natural life, there being no penitentiary or jail suitable or available for your confinement in this district, and the said penitentiary at San Quentin, aforesaid, having been designated, according to law, by the Attorney-General of the United States as a suitable penitentiary for your confinement, and the marshal is directed to transport you to the said penitentiary at San Quentin, aforesaid, and there deliver you to the warden or keeper thereof.

77 And afterwards, to wit, on the 6th day of June, A. D. 1898, the further proceeding was had, which is in words and figures following, to wit:

No. 819.

In the United States district court for the district of Alaska.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* JOHN FITZPATRICK, DEFENDANT. } Motion in arrest of judgment.

Comes now the defendant, and on all the files, records, rulings, orders, testimony, exceptions, and proceedings herein, moves the court to arrest judgment on the ground that the conviction is wrongful and unlawful.

ARTHUR K. DELANEY,
Attorney for Defendant.

(Endorsed:) No. 819. U. S. district court. U. S. of America vs. John Fitzpatrick. Motion in arrest of judgment. Filed Jun' 6, 1898. Albert D. Elliot, clerk. A. K. Delaney, attorney for defendant.

78 UNITED STATES OF AMERICA,
Dist. of Alaska:

I hereby certify that after due and diligent search I failed to find any of the within-named witnesses in this, the district of Alaska.

JAMES M. SHOUP, *U. S. Marshal,*
By S. S. TAYLOR, *Deputy.*

June 16th, 1898.

(Endorsed:) No. 819. In the district court of the United States for the district of Alaska. United States vs. John Fitzpatrick et al. Subpœna for the defendant. Returned and filed June 25, 1898. Albert D. Elliot, clerk.

79 UNITED STATES OF AMERICA,
Dista. of Alaska, ss:

I hereby certify that after due and diligent search I failed to find the Wm. Kennedy named in this attachment in this, the dist. of Alaska.

JAMES M. SHOUP, *U. S. Marshal,*
By S. S. TAYLOR, *Deputy.*

June 15th, 1898.

(Endorsed:) No. 819. In the district court of the United States for the district of Alaska. United States vs. John Fitzpatrick, Henry Brooks, William Corbett. Attachment. Returned and filed June 25th, 1898. Albert D. Elliot, clerk.

80 UNITED STATES OF AMERICA,
Dist. of Alaska:

I hereby certify that after due and diligent search I failed to find the Neal Murphy named in this attachment in this, the dist. of Alaska.

JAMES M. SHOUP, *U. S. Marshal,*
By S. S. TAYLOR, *Deputy.*

June 15th, 1898.

(Endorsed:) No. 819. In the district court of the United States for the district of Alaska. United States vs. John Fitzpatrick, Henry Brooks, William Corbett. Attachment. Returned and filed June 25th, 1898. Albert D. Elliot, clerk.

81 UNITED STATES OF AMERICA,
District of Alaska:

I hereby certify that after due and diligent search I failed to find the Dr. Bailey named in this attachment in this the dist. of Alaska.

JAMES M. SHOUP, *U. S. Marshal,*
By S. S. TAYLOR, *Deputy.*

June 15th, 1898.

(Endorsed:) No. 819. In the district court of the United States for the district of Alaska. United States vs. John Fitzpatrick, Henry Corbett, William Brooks. Attachment. Returned and filed June 25th, 1898. Albert D. Elliot, clerk.

82 [Monday, July 11, 1898. Journal, page 638.]

UNITED STATES, PLFF., *vs.* JOHN FITZPATRICK, DEFT. } No. 819. Order extending time for appeal.

Now, at this day, on motion of Judge A. K. Delaney, attorney for defendant, in open court—

It is ordered that defendant have 30 days' time in addition to the usual 60 days within which to perfect his appeal in the above-entitled cause.

83 [Friday, August 5, 1898. Journal, page 679.]

UNITED STATES, PLFF., *vs.* JOHN FITZPATRICK, DEFT. } No. 819.

Now, at this day, on motion of A. K. Delaney, attorney for defendant—

It is ordered that defendant have 60 days' additional time in which to perfect his appeal in the above-entitled cause, dating from the expiration of the time heretofore granted in the order of this court of July 11, 1898.

84 United States district court, district of Alaska.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN FITZPATRICK, DEFENDANT. } Notice of motion.

Take notice, that on the 20th day of September, 1898, at the court-house in Sitka, Alaska, at the opening of court on that day, or as soon as the next regular mail steamer thereafter shall arrive at Sitka, and counsel can be heard, the defendant will submit to the court, for settlement and allowance, the bill of exceptions herein; a copy of which bill, as proposed by the defendant, is hereunto attached, and herewith served upon you.

Yours, etc.,

ARTHUR K. DELANEY,
Defendant's Attorney.

To BURTON E. BENNETT, Esq.,
U. S. District Attorney, Sitka, Alaska.

85 THE UNITED STATES OF AMERICA,
plaintiff,
vs.
JOHN FITZPATRICK, DEFENDANT. } Order settling bill of exceptions.

Now, at this day, this cause coming on to be heard on the motion of defendant in open court, notice whereof was heretofore filed herein—the plaintiff appearing by Robert A. Friedrich, esq., U. S. attorney, and the defendant by Hector L. Ball—

The defendant presents his bill of exceptions for the approval of the court; the plaintiff asks that certain instructions given by the court in his motion quoted be also made a part of the bill; counsel for the defendant accepts the amendment, and with said amendment the bill as presented by the defendant.

Is ordered by the court to be, and is hereby, settled.

86 United States district court, district of Alaska.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN FITZPATRICK, DEFENDANT. } Bill of exceptions.

The defendant, John Fitzpatrick, was, on the 14th day of May, 1898, indicted under section 5339, R. S. U. S., for the crime of murder, which indictment being a joint one against the said Fitzpatrick and Henry Brooks and William Corbett,

On the 16th day of May, 1898, the defendants jointly challenged the array of the grand jury which brought the indictment as being illegally and irregularly drawn and impaneled, and also moved to quash the indictment for that reason, which said challenge and motion were denied, and to which ruling the defendant then and there excepted, and exception was allowed.

And thereupon, on the said 16th day of May, 1898, the said defendant jointly demurred to the indictment for reasons set forth in said

demurrer (page 8, transcript of record), which said demurrer was overruled, and to which ruling the defendants then and there jointly excepted, and exception was allowed.

On the 24th day of May, 1898, the court, upon application of the United States attorney, and in opposition to the objection of the
87 defendants, ordered the cause set down for trial for Thursday morning, ten o'clock, May 26th, 1898, and that the defendants have until the incoming next mail steamer to put in their defence, to which order the defendants excepted, and exception was allowed.

On the said 26th day of May, 1898, a further order was entered, continuing the cause until the arrival of the next mail steamer, provided that in no event should such continuance be extended beyond Tuesday, May 31st, ten o'clock a. m., said mail steamer failing to arrive before that time, to which order the defendants excepted, and exception was allowed.

On the said 31st of May, 1898, the defendants, upon the affidavits of A. K. Delaney, Mary Dixon, John Fitzpatrick, Henry Brooks, and William Corbett, moved the court for a continuance of the cause over the term, for want of material testimony and witnesses (transcript of record, pages 25 to 35, inclusive), which motion was denied, and to which ruling defendants then and there excepted, and exception was allowed.

On the said 31st day of May, 1898, the defendants Brooks and Corbett, by their attorney, C. S. Blackett, moved for separate trials, which motion was allowed, and the defendant Fitzpatrick excepted, and exception was allowed; thereupon the district attorney moved the trial of John Fitzpatrick to be followed by the trial of William Corbett, and the court so ordered, to which order the defendant Fitzpatrick excepted, and exception was allowed. The trial of Fitzpatrick thereupon proceeded, and he by his counsel, A. K. Delaney, then challenged the array of the petit jury, for reasons set forth in transcript of reporter's minutes of testimony, page 3, which said challenge was denied, and defendant excepted, and exception was allowed.

88 On the trial of said action one John Lewis Brook was called and sworn as a witness in behalf of the prosecution, and upon cross-examination, after testifying that he was a sailor on board the U. S. S. "Concord," the following question was propounded to him by counsel for the defendant: "Did you desert?" To which question counsel for the Government objected, which objection was sustained by the court, to which ruling the defendant excepted, and exception was allowed. (Pages 40 and 41, transcript of evidence.)

On said trial one Philip Ballard was called and sworn as a witness in behalf of the Government, and, after testifying to a certain conversation with a person not the defendant, Fitzpatrick, was asked the question, "Who was this man?" and the said witness testified, "Well, I was told afterwards it was" . Whereupon counsel for defendant objected to witness stating what he was told, and without waiting for a ruling of the court counsel for the Government asked the question, "Did you find out afterwards who it was?" To which question counsel for defendant objected, and objection was overruled, and defendant excepted, and exception was allowed. Whereupon counsel for the Government asked the witness the following question: "Who did you find out afterwards

who this man was?" To which said witness responded, "Well, they told me the man's name was Corbett." Whereupon counsel for defendant moved to strike out said testimony as hearsay, which motion was denied, and defendant excepted, and exception was allowed. The man Corbett was then, at the request of the district attorney, brought into the court room, and the witness was asked the following question: "Is that the man that applied to you?" To which said witness answered, "I
89 couldn't say that it was, for sure." And the witness was then asked the question by the district attorney, "What is your best judgment?" To which the witness replied, "Well, I saw the man in the dark. It was in front of the cabin, and there was only a candle light in the cabin. He came there about a minute. That is the first time I ever saw the man in my life. I couldn't say that it was the man that was there or not." Whereupon counsel for the Government asked the following question: "Now state what is the best of your judgment." To which question counsel for defendant objected, for the reason that witness had already stated he could not tell, which objection was overruled, and counsel for defendant excepted, and exception was allowed, and the witness proceeded to answer. Whereupon witness was asked if he testified before the grand jury, and after answering in the affirmative was asked by the district attorney the following question: "What was your testimony there?" To which the witness answered, "I testified there was a man came to me. They asked me if it wasn't Corbett, and I told them it resembled him. They said then, 'You know it was Corbett,' and I didn't tell them that I thought it was at all; they wanted to have me say that. They said it for me, so I let them have it at that." Whereupon the court, addressing the witness, said: "Mr. Witness, answer that question; whether that is the man that applied to you that evening; whether it was or was not, to your best judgment." To which the defendant objected, and the objection was overruled, and exception was taken and allowed, and the witness answered as follows: "Well, I should say it was, to my best judgment." Whereupon counsel for the defendant moved to strike out all of the testimony of the witness Ballard on the ground that it does not contribute in any manner to the identification
90 or guilt of the defendant Fitzpatrick, then on trial, which motion was overruled and an exception taken by the defendant and allowed. (Transcript of evidence, pages 49 to 53, inclusive.)

That afterwards, on said trial, the Government called and examined as a witness in its behalf one Dr. T. L. Price, who testified as follows: Question by the district attorney:

Q. Dr., I believe you testified heretofore; please state to the court and jury what time it was on the morning of the thirteenth of March, 1898, that William Corbett applied to you for medical assistance.

A. "Somewhere about three o'clock."

Q. "Whereabouts was he wounded?"

A. "In the right shoulder."

Q. "How long was he under your attendance?"

A. "Three weeks or about a month; I don't remember the exact time."

Which said testimony counsel for defence moved to strike out on the ground that it does not affect the defendant on trial. Motion was denied, exception taken and allowed. (Transcript of evidence, page 54.)

That afterwards a witness, John Cudihee, was sworn and examined in behalf of the Government, and after producing in court two pairs of shoes, testified that one pair was Corbett's and one pair Fitzpatrick's, whereupon said shoes were offered in evidence, to which offer counsel for defendant objected on the ground that the same had not been sufficiently identified and on the further ground that any testimony relating to Corbett is improper and irrelevant on the trial of this defendant, which objection was overruled and an exception taken and allowed.

91 That afterwards in the examination of said witness by the Government, he testified to certain footprints which he discovered about the cabin where the homicide occurred, and was asked by the district attorney the question:

Q. "How did these nails (referring to the nails in Corbett's shoes) fit into the holes in the sand, if they fitted at all?"

A. "Well, the impression in the sand looked very much as if it was made by that shoe." [Indicating Corbett's shoe.]

Q. "Did you fit the shoe into the impression?" to which question counsel for defendant objected as leading, and the objection was overruled and an exception taken and allowed.

A. "I did; yes, sir."

Q. "Did it fit, nail holes and all, with the worn-off end of the shoe?"

A. "Well, I suppose it fitted."

Q. "Did it fit?"

A. "Yes, sir."

Counsel for defendant then moved to strike out all the testimony of this witness in reference to Corbett's shoes on the ground that it can not affect the guilt or innocence of the defendant now on trial, which motion was denied, and exception taken by defendant and allowed.

Upon his redirect examination the said witness testified as follows:

Q. "While you were examining Fitzpatrick's cabin, what else did you find there?"

A. "Oh, there was a lot of provisions, and a lot of tools, and one thing and another."

Q. "What kind of tools?"

A. "Augers and knives, axes and pickaxes."

Q. "Did he have any burglar tools there?"

A. "There was some kind of tools there; I don't know whether

92 they were burglar tools or what they were."

Q. "Did you find any keys?"

A. "Yes, sir."

Q. "What kind of keys?"

A. "I don't know what kind of keys they were, just common door keys."

Counsel for defence here moved the court to have the foregoing testimony stricken out, on the ground that it is connected with this case, the defendant not being on trial for burglary. Motion denied; exception taken and allowed. (Transcript of testimony, pages 68, 69, 71, 82, and 83.)

The Government having rested its case, the defendant, Fitzpatrick, was sworn in his own behalf, and his full testimony upon direct examination is as follows:

Q. "Mr. Fitzpatrick, you are the defendant now on trial?"

A. "Yes, sir."

Q. "Can you tell the jury where you were on the night of the 12th of March from about eleven o'clock in the evening until the next morning?"

A. "I was up between Clancy's and Kennedy's; I had been in Clancy's up to about half past twelve or one o'clock; about one o'clock, I guess. I went up to Kennedy's and had a few drinks with Captain Wallace and Billy Kennedy, and I told them I was getting kind of full and I was going home, and along about quarter past one Wallace brought me down as far as Clancy's, and then he took me down to the cabin and left me in the cabin, and we wound the alarm clock and set it to go off at six o'clock; and I took off my shoes and laid down on the bunk, and woke up at six o'clock in the morning and went up the street."

93 Q. "Now, is the Kennedy and Wallace that you refer to the witnesses that are mentioned in the affidavit of Corbett and Brooks for a continuance; you heard the affidavit read?"

A. "Yes, sir."

After the foregoing testimony of Fitzpatrick, comprising all of his examination in chief, counsel for the Government upon cross-examination, among other interrogatories, propounded the following question:

Q. "Who roomed with you in the cabin there?" To which defendant objected, on the ground that the cross-examination must be confined to the subject-matters brought out by the direct examination, which objection was overruled and exception taken and allowed. (Transcript of evidence, pages 92 and 93.)

Afterwards counsel for the Government asked said witness the following question:

Q. "Did you have shoes or boots on that night?" To which question defendant objected for the reason last above given. Objection was overruled, and exception taken and allowed.

Counsel for the Government then propounded the following question:

Q. "Did you have on the same suit you have on now?" To which counsel for defendant objected for the same reason, which objection was overruled and exception taken and allowed.

Counsel for the Government then asked the following question:

Q. "Do you remember what kind of suit you did have on?" To which question counsel for defendant objected for the same reason. Objection was overruled, exception taken and allowed.

94 Counsel for Government then propounded the following question:

Q. "Did you have the same hat on that night that you have now in your hands?" To which counsel for defendant objected. Objection was overruled; exception taken and allowed.

Counsel for Government then asked the witness the following question:

Q. "Have you a fur cap also?" To which counsel for defence objected on the same grounds, and objection was overruled; exception taken and allowed.

Counsel for Government also asked the witness the following question:

Q. "About the time the homicide took place, did you have a mackinaw suit with a large belt and buckle?" To which counsel for defendant objected for the same reason above given, which was overruled, and exception taken and allowed.

After the witness had testified that he was working on the 12th of

March, 1898, for Wilson and Kennedy, counsel for Government asked the witness the following question:

Q. "What were you doing for them?" To which question counsel for defendant objected for the same reason, and objection was overruled, and exception taken and allowed.

Counsel for the Government then proceeded to examine the witness regarding the sort of clothes he had been wearing, and, among other questions, propounded the following with reference to a mackinaw suit?

Q. "Had you worn it, you think, a week or two previous right along?" To which question counsel for defendant objected for the same reason, and objection was overruled, and defendant excepted and exception was allowed.

Counsel for the Government also asked the said witness if he had a pair of rubber boots. To which question counsel for defence
95 objected for the same reason, and objection was overruled, and exception taken and allowed.

Counsel for Government also asked the witness the question:

Q. "How long have you known William Corbett?" To which counsel for defendant objected for the same reason. Whereupon the court asked the district attorney the object of the question. To which the district attorney replied that it was to test the credibility of the witness. Whereupon the objection was overruled and exception taken and allowed.

Counsel for the Government also asked the witness the following question:

Q. "Do you know whether he (Corbett) had a pair of shoes with nails in the bottoms of them?" To which question counsel for defendant objected for the same reason, and objection was overruled, and exception taken and allowed.

Counsel for the Government then asked the witness the following question:

Q. "When did you first see Corbett?" (Referring to the 13th of March, 1898.) To which question counsel for defence objected for the same reason, and objection was overruled, and exception taken and allowed.

Counsel for the Government also asked the witness the following question:

Q. "Did you see William Corbett on the evening of the 12th of March, this year?" To which counsel for the defence objected for the same reason, and objection was overruled, and exception taken and allowed.

Counsel for Government also asked the witness the following question:

Q. "Do you remember the kind of shoes Corbett had on that evening?" (Referring to March 12th, 1898.)

96 To which question counsel for defence objected, for the same reason, and objection was overruled, and exception taken and allowed.

Counsel for Government also asked the witness the following question:

Q. "Was anybody else in the cabin that you saw besides these two men? (Referring to Brooks and Corbett.)" To which question counsel for defence objected for the same reason, and objection was overruled, and exception taken and allowed. (Transcript of testimony, pages 92, 93, 94, 95, 96, 97, 98, 99, 101, 102, 104, 105, and 106.)

In rebuttal the Government called as a witness Captain J. M. T. Young, and after he had testified that he was acquainted with the use of firearms and guns, counsel for the Government asked the question.

Q. "Have you ever observed their appearance as to light when fired in the nighttime?" To which question counsel for defendant objected as not being rebuttal, which objection was overruled, and exception taken and allowed.

Government also called as a witness Dr. S. S. White, and among other questions asked the following:

Q. If on a dark night, a person firing a gun at that end of the room, and a person standing at the other end of the room, could he see the person who did the firing?" To which question counsel for defendant objected as not proper rebuttal, and the objection was overruled, and exception taken and allowed.

After the close of the testimony, the counsel for the defendant
97 asked the court, among other instructions to the jury, to give the following (instruction No. 1):

In this case the defendants are jointly indicted, and in order to sustain a conviction it is necessary for the Government to establish a common design or intent or purpose by two or more of the defendants to commit murder, or some other felony, or actually engage in such attempt, and this constitutes or is the essence of the charge of a conspiracy, and this common design or actual participation must be proved in order to warrant a conviction, either by direct evidence or by proof of such circumstances as naturally tend to prove it, and sufficient in themselves to satisfy the jury of the existence of such common design or actual participation, beyond a reasonable doubt.

Such instruction was given, with the addition thereto by the court of the following words: "Unless you shall find beyond a reasonable doubt that the defendant wantonly shot and killed the deceased without excuse or justification." To which instruction as thus given the defendant filed his written exception. (Transcript of record, pages 37 and 49.)

The defendant, by his counsel, also asked the court to give the jury the following instruction (instruction No. 7):

You are also further instructed that in all criminal trials where the prosecution depends upon circumstantial evidence which is not conclusive in its character, previous good character on the part of the defendant, if proved, is entitled to great weight in favor of innocence, and where there is a serious conflict in the testimony as to the commission of any offence like that charged in this case, evidence of the previous good character of the defendant should be considered by the jury in connection with all other
98 evidence given on the trial, in determining whether the defendant would be likely to commit or did commit the offence in question; that in doubtful cases evidence of good character is conclusive in favor of the party accused, and if you find from the evidence that facts and circumstances proved and relied upon to establish the defendant's guilt are in doubt, or that the intention of the defendant to commit the crime is in doubt, then if the prisoner has by evidence satisfied you that he was a man of good character up to the time of the alleged offence in this case, the presumption of law is that the alleged crime is so inconsistent with the former life and character of the defendant that he could not have

intended to commit such a crime, and it would be your duty to give the defendant the benefit of that presumption and acquit him.

This instruction the court refused to give, to which ruling the defendant duly excepted in writing. (Transcript of record, pages 39, 40, 51, and 52.)

The court also further charged the jury in the following language: "But if you shall fail to find the defendant guilty of murder, either with or without the above qualification, you may under the law of this district find him guilty of manslaughter, if the evidence so warrants. Manslaughter is the unlawful killing of a human being by another human being without excuse or justification, but without malice express or implied. The Revised Statutes of the United States, which is the law of this district applicable to this case, defines manslaughter as follows: Every person who unlawfully and willfully, and without malice, strikes, stabs, wounds, or shoots at, or otherwise injures another,
99 of which striking, stabbing, wounding, shooting, or other injury such other person dies, either on land or on sea, within or without the United States, is guilty of the crime of man-laughter. So in this case if you find from all the evidence, beyond a reasonable doubt, that the defendant at the time and place in the indictment charged, unlawfully and willfully, but without malice, express or implied, under the law as I have heretofore given it to you on that subject, shot and killed the deceased, then the crime is m[illegible]laughter."

To which instruction the defendant duly excepted in writing. (Transcript of record, pages 46, 47, 52, and 53.)

Afterwards, on the 2nd day of June, 1898, and after the jury had returned their verdict into court, the defendant by his counsel entered his motion for a new trial, which was denied by the court, to which ruling the defendant excepted. (Transcript of record, page 49, and transcript of journal of entries, page 16.)

And the defendant thereupon by his counsel moved an arrest of judgment, which was also denied by the court, and to which ruling the defendant duly excepted. (Transcript of record, page 62, and transcript of journal entries, page 16.)

The foregoing is hereby settled and allowed as the bill of exceptions in the foregoing entitled action of the United States vs. John Fitzpatrick.

By the court.

Dated Sept. 20, 1898.

CHARLES S. JOHNSON, *Judge*.

100 Due service of a copy of the within notice and bill of exceptions is admitted this 5th day of September, 1898.

BURTON E. BENNETT,
Attorney for Plaintiff.

(Endorsed:) No. 819. In the district court of the United States for the district of Alaska. United States, plaintiff, vs. John Fitzpatrick, defendant. Bill of exceptions and notice. Filed September 20th, 1898. Albert D. Elliot, clerk. Arthur K. Delaney, attorney for defendant. Juneau, Alaska. Original.

101 In the United States district court for the district of Alaska.

THE UNITED STATES OF AMERICA)
vs.) Amendments to bill of exceptions.
JOHN FITZPATRICK, DEFENDANT.)

Now comes the plaintiff, the United States of America, and asks that the proposed bill of exceptions be amended as follows, to wit:

Immediately after line 372, at page 13, the following instructions given by the court:

"The defendant having put in issue his former good character you have the right to consider all the testimony introduced by either the plaintiff or defendant touching his reputation or character. But it matters not how good a reputation or character the defendant may have sustained, if you are convinced beyond a reasonable doubt of his guilt in this case, his former good character will not exonerate him. The good character of the accused is permitted in evidence for the purpose of showing the improbability of his having committed the crime."

And also the following instruction that was asked by the defendant and given by the court: "And in this case if you believe from the evidence that prior to the commission of the alleged crime the defendant had always borne a good character among his acquaintances and in the neighborhood where he lived, then this is a fact properly to be considered by you with all the other evidence in the case in determining the question whether the witnesses who have testified to facts tending to criminate him have been mistaken, or have testified falsely or truthfully, and if, after a grave consideration of all the evidence in the case, including that bearing upon his previous good character, you entertain any reasonable doubt of the defendant's guilt, it is your duty to acquit him."

ROBERT A. FRIEDRICH,
United States Attorney.

102 The foregoing proposed amendment having been agreed to and accepted in open court by plaintiff and defendant, is settled and made a part of the bill of exceptions.

Dated Sept. 20, 1898.

CHARLES S. JOHNSON, *Judge.*

103 In the United States district court for the district of Alaska.

THE UNITED STATES)
vs.) No. 819.
JOHN FITZPATRICK.)

Testimony taken upon the trial of the above-entitled cause.

Upon the application for a continuance of the case over the term, counsel for the Government stated in open court that he was willing to admit that if the witnesses set out in the affidavit for a continuance on behalf of the defendant were present they would testify as set forth in the said affidavit.

Counsel for the defendant stated to the court that such admission was not sufficient under the law, but that the admission must cover the truthfulness of the facts and the materiality of the evidence.

By the COURT. The motion for a continuance is overruled as to each of the defendants, for the reason that the Government has admitted that if the witnesses were present whose names appear in the affidavit for a continuance they would testify as in the affidavit set forth, and for the further reason that the counsel for defendant, in the opinion of the court, have not shown diligence in attempting to procure the attendance
104 of the witnesses claimed to be within the district, in this, that upon the return of the first subpœna had counsel issued another subpœna and placed it in the hands of the marshal of this district the same could have been served and the witnesses could have been present by the usual mail steamers traveling between Juneau, Dyea, and Sitka.

As to the contention of counsel for the defendant that the Government is required to admit not alone that the witnesses would testify, if present, as set forth in the affidavit, but must admit the statements as matters of fact and must admit the materiality of it, the court declines to require the Government to make any such admission, and to that extent overrules the request of the defendant's counsel.

Counsel for the defendant then and there duly excepted to the ruling of the court.

Mr. C. S. Blackett, counsel for the defendants Corbett and Brooks, who were jointly indicted with the above-named defendant, demanded, under section 161, Oregon Code of Proceedure, separate trials for each of the defendants.

By the COURT. Do you mean separate from Fitzpatrick, or separate from each defendant?

By Mr. BLACKETT. I presume that we can not elect; that, if we demand separate trials, I presume they will all have to be separate. Separate trial for each defendant; yes, sir.

By the COURT. I am inclined to think that provision of the Oregon Code applicable and I think we take our proceedure largely under
105 it, and I know of nothing in the Federal practice that would prohibit it, and I shall allow the defendants to have separate trials, Corbett and Brooks.

By COUNSEL FOR DEFENDANT FITZPATRICK. Mr. Fitzpatrick is not demanding a separate trial; the trials must be moved in the order they are set. We are not a party to this proceeding at all.

By the COURT. When two men are indicted jointly for any crime, and one by his counsel elects to be tried separately, and the court believes he is entitled to it, I take it for granted that the other man will be compelled to be tried separately. The motion I have granted, and that places Fitzpatrick alone, and the defendant's attorney has elected to place Fitzpatrick on trial first; I shall hold that is his right.

Counsel for the defendant Fitzpatrick then and there duly excepted to the ruling of the court.

By JUDGE DELANEY, defendant's counsel. Before proceeding to the examination of the jury I desire to enter a challenge to the array, on the grounds: First. That the jury has not been selected, drawn, and summoned as provided by law. Second. That at the time the tales men were drawn on the day shown by the record, three hundred names were not in the box as provided by the supplement of the Revised Statutes.

Challenge denied by the court, to which ruling counsel for the defendant then and there duly excepted.

106 The jury having been selected and sworn to try the cause, the case proceeded as follows:

By Judge DELANEY. I may make the statement after the Government closes.

By the COURT. No; the practice has been to make it at the opening of the case.

By Judge DELANEY. I don't know that it is *p*remptory either way, but I prefer to have the right to make the statement after the Government has introduced its testimony.

By the COURT. I think I will permit you to do it.

Counsel for the defendant asked the court to exclud' from the room and earshot of these proceedings all of the witnesses on behalf of the Government except the one testifying upon the stand.

By the COURT. The motion is granted, and all of the witnesses in this case will be excluded from the room and from the hearing of this cause, and will remain out of the room and out of hearing, except the one called by counsel; and the witnesses for the defense under the request of the prosecution will also be excluded from the room until called upon to testify.

107 JOHN K. ROSS, called on behalf of the prosecution, being first duly sworn, testified as follows:

Examined by B. E. BENNETT:

Q. What is your name?
A. John K. Ross.
Q. Where do you reside, Mr. Ross?
A. I make my home at Dyea.
Q. Alaska?
A. Yes, sir.
Q. Do you know the defendant here, John Fitzpatrick?
A. Yes, sir.
Q. Did you know Samuel Roberts in his lifetime?
A. Yes, sir; for about a month.
Q. Did you see Samuel Roberts on the 13th day of March, this year?
A. Yes, sir.
Q. At Dyea?
A. Yes, sir.
Q. What was his business there? Did he run the Wonder Hotel?
A. I don't know whether he was interested in the Wonder Hotel or not.
Q. Please state to his honor the court and to the jury what took place when you saw him on the morning of the 13 of March.
A. Soon after two o'clock on the morning of the 13th of March Roberts came to me and asked me to accompany him to his cabin and to bring with me a sack containing money.

108 Q. Whereabouts were you when he spoke to you about this?
A. I was standing in the Wonder Hotel. We went across the street towards the cabin.
Q. What cabin?
A. Towards his cabin; it was on the other side of the street.

Q. Was that where he lived?

A. Yes, sir; where he slept. When we came to the steps Roberts was following me. I went up the steps and stood on the top step and Roberts opened the door and we both stepped inside. Roberts struck a match, or rather two, and while the sulphur was burning on these matches we heard the rustle of a piece of tin and Roberts cast his eyes towards me, as much as to say something is wrong. We both stepped out of the door. Instantly there was a report of a gun inside of the cabin. Roberts crowded me off the porch. This sack containing the money weighed, I should judge, forty or fifty pounds. It fell off my shoulder, off the cabin door, and I fell off to the right of the door, off the steps. As I was falling, Roberts got to the ground and was standing with a gun in his hand facing the cabin door, backing away from the door. Just as I hit the ground I heard the report of a pistol from the outside of the cabin and soon heard hurried footsteps pass close to me. I then heard the report of a gun from the inside of the cabin. In a few seconds a man came out from the inside of the cabin and stood on the porch and raised his gun quite high, about like that, and fired two shots in the direction of the
109 Wonder Hotel, turned to the right in a very leasurely manner, got off the steps and disappeared behind the north side of the house.

Q. Did you recognize who that man was?

A. Yes, sir.

Q. Who was it?

A. That man there, John Fitzpatrick. As he disappeared behind the north side of the house I got up and started to run towards the south side. I struck my foot on a piece of lumber there and fell down, and then limped over to a pile of lumber. There was a building in the course of erection. Looking over to the Wonder Hotel, I saw a number of men standing in front of the doors and windows, and I sang out for someone to come over with a lantern. In a short time a Mr. Brennan appeared and asked me if I was hurt. I said, "No." He then said, "Where is Sam?" and I said, "I guess they got him," and started to look for him. We then went to the front of the cabin, and I think Brennan found the sack. About that time a Mr. Brock appeared from the hotel, and one of them handed me the sack. Brennan and I went westerly towards the Wonder Hotel, and we found the body of Roberts lying with his feet towards the cabin door. He was lying on his back. Brennan kneeled down beside of him, or stooped down, I wouldn't be positive which, and put his hand under his head, raised it, and asked him if he knew him. Roberts gave a gasp and his head fell back, and Brennan said, "My God, he is dead." Brennan then disappeared, and at someone's suggestion the body was taken to the Wonder Hotel and laid on a table.
110 While I was standing looking at him Brennan came in with a doctor, who pronounced Roberts dead. It was then suggested that the body be taken to the cabin, which was done, and there was two men selected to stay with the remains until morning, and that was the last I saw of Sam Roberts until the day we buried him.

Q. Did you see Samuel Roberts after he was dead?

A. Yes, sir.

Q. Did you examine his wound?

A. I saw where the wound was.

Q. Whereabouts was it? State that to the court and jury, if you remember.

A. As near as I could tell, it was about that direction. [The witness illustrates by pointing to the right bre'st under the arm.] That is, there was a hole of a bullet upon the right side.

Q. State to the court and jury what caused his death, if you know it.

(Counsel for the defendant objected to the above question as not proper. Objection sustained by the court.)

Q. Did this occur in Dyea, Alaska?

A. Yes, sir.

Q. Now, just state to his honor the court and the jury about the cabin; describe the cabin.

A. The cabin was built on posts, probably about 18 inches high, I should judge, and I should think the cabin was about twelve by
111 twelve. I should think that was the size of the cabin; three steps up to the door.

Q. How many windows were there in front?

A. One window.

Q. And one door?

A. One window and one door.

Q. How far was this from the Wonder Hotel; about how far, if you know?

A. I don't think it is over one hundred and fifty feet.

Q. About across the way, is it?

A. Nearly opposite; yes, sir.

Q. State, if you know, Mr. Ross, what Mr. Roberts' practice was in regard to taking his money from the Wonder Hotel, when he closed up, to the cabin where he lived.

A. He generally put the smaller sack in the larger one, made like a mail sack, and carried it over there every night.

Q. How long had he been doing that, to your knowledge?

A. A month, lacking three days.

Q. Did any person go over with him?

A. Always somebody.

Q. Sometimes one man and sometimes another?

A. Yes, sir.

Cross-examination by Judge DELANEY:

Q. How large a building is the Wonder Hotel?

A. I don't know.

Q. Approximate?

A. I should say it was thirty by one hundred; thirty feet front.

Q. Single story, story and a half, or two stories?

112 A. Two stories; that is, there was bunks upstairs; it is only a story and a half building.

Q. Which way did it face as to the points of the compass?

A. It faces east.

Q. What is the name of the street that runs in front of it?

A. I don't know.

Q. Then that street approximately runs north and south?

A. Yes, sir.

Q. And the Wonder Hotel stands, then, on the west side of that street?

A. Yes; that is the way I understand it.

Q. I believe they call that Main street, don't they, Ross?

A. It is the principal street in the town; it is the one that leads up from the shore.

Q. Do you know the width of the street as laid out?

A. No, sir; I should judge it to be forty feet.

Q. That is, judging the distance from the hotel to the cabin?

A. I would put the street at forty feet.

Q. Then the cabin stands on the east side of the street and facing the west?

A. Yes, sir.

Q. What distance do you say it is from the Wonder Hotel?

A. About one hundred and fifty feet.

Q. Does the Wonder Hotel stand out flush with the street?

A. No, sir; I think there is a sidewalk of about six feet.

Q. Between it and the street?

A. Yes, sir.

Q. That would throw the cabin back in the lot on the other side?

113 A. Yes, sir.

Q. How far?

A. I believe Mr. Green had a contract let to build a house on the other side of the street that was ninety feet deep.

Q. Don't tell what Green told you; have you any way to judge the distance?

A. That is the way I judge the distance.

Q. Don't repeat the conversation; how far is the cabin back from the street?

A. Well, it must be in the neighborhood of a hundred feet.

Q. Is the ground cleared in that vicinity?

A. There was a great deal of lumber scattered around.

Q. I mean the timber off.

A. Yes, sir.

Q. Was it formerly timbered?

A. I don't know.

Q. Are there any stumps there?

A. No, sir.

Q. Apparently a clear piece of ground?

A. Yes, sir.

Q. You say the cabin stands nearly opposite the Wonder Hotel?

A. A little north of the Wonder Hotel.

Q. Whereabouts in the cabin is the door, with reference to the front end of the cabin? Locate it.

A. If this table was the front of the cabin, the door would be about here, a few inches from this corner; that is, facing the west.

114 Q. Then does the door fall on the right hand or the left hand as you face it from the Wonder Hotel?

A. It went back against the wall.

Q. The left-hand side or the right-hand side?

A. The left-hand side.

Q. Now, is there any platform, or was there at that time, in front of the door?

A. Yes, sir.

Q. About how large?

A. I should judge it was about 18 inches wide and about as long as the door was wide, probably two feet six or eight.

Q. And about 18 inches in width from the door out towards the street?

A. Yes, sir; 18 inches.

Q. Then the steps led from the ground up to this platform?

A. Yes, sir.

Q. How many steps?

A. Three, including the platform.

Q. And the window is at the right hand of the door?

A. Yes, sir.

Q. When did you see the wound on the deceased?

A. When he was lying on the table in the Wonder Hotel.

Q. The night of the homicide, or the morning?

A. Yes, sir.

Q. Did you pay any particular attention to the wound?

A. No, sir.

Q. Saw a lot of blood; that is all?

115 A. That was all.

Q. Can you testify whether or not it was a bullet hole?

A. I can not; no, sir.

Q. And you didn't know what produced the wound from the looks of the wound itself?

A. No, sir.

Q. You didn't examine the wound enough to determine that?

A. No, sir.

Q. Was the blood you saw, or what had the appearance of a wound—can you locate it with reference to the right nipple?

A. I never saw him undressed.

Q. Didn't see him undressed?

A. No, sir.

Q. The wound you saw you infer was a wound from the appearance of the clothing?

A. From the blood; that is all.

Q. You didn't see the man stripped?

A. No, sir; I didn't.

Q. About how far was the body from this steps at the time that you and Brennan found it?

A. I think his feet were about fifteen feet from the step; he was lying on his back with his feet towards the door.

Q. He was lying on his back?

A. Yes, sir.

Q. With his feet towards the door?

A. Yes, sir.

Q. And about fifteen feet of the steps?

116 A. I should judge so; I never measured it.

Q. Was the body directly in front of the steps, or a little to one side; and if so, which side, right or left, facing the cabin?

A. I think it was almost in front of the door; I wouldn't be positive, though. It might be a couple of feet either way; I couldn't say.

Q. Who discovered the body first?
A. Mr. Brennan.
Q. Was the door locked when you got there—the cabin door?
A. Yes, sir.
Q. Who had the key?
A. Roberts.
Q. Did you preceed' him or go after him in crossing from the Wonder saloon to the cabin?
A. I was ahead of him.
Q. Did you enter the cabin first?
A. No, sir; he entered first.
Q. Where did you change places?
A. On the step.
Q. On this little platform?
A. Yes, sir.
Q. And he unlocked the door?
A. Yes, sir.
Q. Did he step in first?
A. Stepped in first.
Q. Which way does this door swing?
A. It swings back to the north, or to the left.
117 Q. To the left as you go in?
A. Yes, sir.
Q. And Roberts had struck a match, or a number of matches?
A. Yes, sir.
Q. Before or after you entered the cabin?
A. After.
Q. And after he had unlocked the door?
A. Yes, sir.
Q. Then there was a rustle of a tin can?
A. A piece of tin; we found out afterwards it was a tin can.
Q. Whereabouts, with reference to the cabin, was this noise; could you locate it?
A. It sounded right in front of us.
Q. Right in front of you?
A. Yes, sir.
Q. And then after you had stepped inside there was a pistol shot?
A. No; after we had stepped outside.
Q. When you heard the can rattle you retreated—that the idea—stepped back on this little platform?
A. Yes; stepped right out one step.
Q. And you ahead?
A. Yes, sir.
Q. Both of you retreated backwards?
A. No, sir; sideways.
Q. Sideways?
A. Yes, sir.
Q. You each had your sides to the cabin—that the idea—or backing out?
118 A. No; here is the door here; I am standing just as I am now, sack on this shoulder—I made a step to the right—that takes me onto the step.

Q. That step is directly in front of the door?
A. Yes, sir; right in front of the door.
Q. The same level as the threshold?
A. Maybe an inch or so—not much difference.
Q. Then Roberts followed you?
A. Yes, sir.
Q. Did he turn around on the step?
A. I don't know; I know he crowded me off the step.
Q. As he came out of the door?
A. Yes, sir.
Q. Roberts, as I understand you, pushed in some way against you and you fell?
A. Yes, sir.
Q. And dropped the sack?
A. Yes, sir.
Q. Whereabouts, with reference to this step, did you fall?
A. As I went down the steps, I tried to recover myself, but slipped and fell to the right of the steps.
Q. What became of Roberts?
A. As I was falling I saw him backing away from the door.
Q. Did you get stunned by this fall in any way?
A. Well, I don't know whether I did or not.
Q. Didn't you state that you did?
A. I said that on my examination that I thought I was stunned.
119 Q. That was at the examination before the commissioner?
A. Yes, sir.
Q. And after that you didn't see anything more of Roberts until you discovered the body?
A. No, sir.
Q. This money, as I understand it, belonged to the games that Roberts was running on the ground floor of the Wonder Hotel?
A. That is right.
Q. And you dealt faro for him?
A. That is right.
Q. Had you been yourself in the habit of going with him every night with this money?
A. That was the first time I ever went with him.
Q. Some of the other boys about the place had gone before?
A. Yes; I saw several different ones.
Q. These other times, then, that is not that night you refer to?
A. Yes, sir.
Q. After the first pistol shot was discharged where did the second report come from, in the cabin or out the door?
A. Out the door?
Q. From what direction?
A. I couldn't tell. Just simply heard it on the outside?
Q. Just simply heard it on the outside?
A. That is all.
Q. Do you know whether or not it came from one or the other of the back corners of the cabin?
120 A. I do not; I couldn't tell what direction it came from.

Q. Now, where did the third shot come from?
A. Inside the cabin.
Q. Inside the cabin?
A. Yes, sir.
Q. And the fourth shot?
A. The fourth and fifth shots were fired by that man standing on the step.
Q. On this little platform?
A. Yes, sir.
Q. Where were you?
A. I was lying to the right of the steps as you go into the cabin.
Q. You hadn't got up yet?
A. No, sir.
Q. In what direction were the shots delivered?
A. In the direction of the Wonder Hotel—fired from the east to the west.
Q. And the pistol was held pretty high?
A. About a relative position—about that high. [The witness indicates the heighth of the shoulder.]
Q. How was the light, with reference to darkness or light, that night?
A. A very dark night. There was no moon or starlight.
Q. Had you ever seen the defendant before?
A. If I had I didn't know him.
Q. Not intimately acquainted with him?
A. No, sir.
121 Q. You didn't have a casual acquaintance?
A. No, sir.
Q. If it was a dark night, how do you identify the man as this defendant?
A. By the flash of these pistol shots?
Q. Then I understand you to say that Fitzpatrick is the only man that you saw?
A. The only one.
Q. The only one that you identify in any manner?
A. Yes, sir.
Q. Mr. Ross, when did you first come to the knowledge of the fact that you could identify, and did identify, this defendant by the flash of the pistol shots?
A. When I was lying on the ground.
Q. Did you testify to it before the commissioner?
A. I did not.
Q. I will ask you if this is not substantially a translation of your testimony before the commissioner: "We went directly to the cabin from the hotel. I was ahead of him until we got to the cabin; then I stepped to one side to let him open the door. He unlocked it and we both stepped inside; he scratched a match with his left hand; I was looking at the sulphur burning on the match. We heard the rustle of a piece of tin; immediately a shot was fired and we both staggered out of the door. I got out and the sack fell off my shoulder, and I fell right there on my back, out from the door. I heard a shot and the next I saw

was a man standing on the step firing two shots at two men; this
122 man then jumped off the steps. I got up from where I was and started to run around the south side; tripped on some lumber and fell down. Then I called for assistance; then two men with a lantern came over to where I was, and we found the body of Roberts"——

A. I didn't say two men.

Q. Then you stated "That is all I know;" did you so testify before the commissioner?

A. That is about what I testified to before the commissioner?

Q. What you testified to there, was that all you knew at that time?

A. No, sir; it was not.

Q. How did you come to make this statement, that was all you knew?

A. I was afraid of my life to testify what I knew there.

Q. You have since made up your mind to state it here?

A. Yes, sir.

Q. Then you didn't tell the whole truth before the commissioner?

A. I didn't tell all I knew.

Q. At the same examination before the commissioner I will ask you that if in response to the question by the defense, the following question: "You have told everything you know about the shooting?" Your answer, "Yes; I have, to the best of my knowledge"?

A. I don't remember that.

Q. You don't remember that?

A. No, sir.

123 Q. Now, in response to an interrogation propounded to you by the Court, I ask you if you didn't testify as follows: "Ques. Mr. Ross, did you catch sight of the figure of the man standing on the upper step?" "Ans. Yes, I saw him." "Ques. Can you describe him?" "Ans. I could not." "Ques. Do you know whether he was a tall or short man, or a large man?" "Ans. I could not tell; I could not say; I saw a dark figure standing there and that is all I could say about it; I couldn't saw whether he was tall or short, large or small." Did you so testify before the commissioner?

A. I did; yes, sir.

Q. Now, when was this examination before the commissioner held?

A. I think it was on the 16th of March.

Q. And the homicide occurred on the morning of the 13th?

A. Yes, sir.

Q. You said something about there being lumber around this building; I want to get some information concerning that; was that piled around on all four sides of the cabin, or just on one side? If so, where?

A. Mostly on the south side; there might have been some on the north side; I don't know for certain whether there was or not.

Q. Was it piled regularly or just thrown down in a heap?

A. Some scattered around and some piled up.

Q. I mean, piled up regularly?

A. Some was.

124 Q. Difference kinds of lumber?

A. Yes, sir.

Q. A pretty large quantity of it?

A. Well, there was a good deal; yes, sir.

Q. That is the stuff you stumbled over after you got up from the ground near the steps?

A. Some of it; yes, sir.

Q. You remained there until Brennan and you got together?

A. No, sir; I got up and limped over to a pile of rafters there, probably twenty feet.

Q. On the south side of the cabin?

A. Yes, sir.

Q. Did you sit down on the pile of rafters?

A. Yes, sir.

Q. At the time Brennan came over, do you know whether he had a lantern or not—the first time?

A. He had.

Q. That is the first time you had discovered him or heard anything of him?

A. Yes, sir.

Q. And Brennan discovered the body first?

A. He was ahead of me, consequently he saw it first; yes, sir.

Q. By the light of the lantern you found the body?

A. That is right.

Q. Then shortly after that this other man, Brock, came up?

A. No; Brock was there about the time we found the sack.

Q. Did Brennan have the lantern then?

A. Yes, sir.

125 Q. You found the body after you found the sack?

A. Yes; that is right.

Q. About how long?

A. Well, while it would take us to walk three or four steps.

Q. Then it was so dark that you could not discover the body without the lantern?

A. No.

Q. Don't you remember testifying that this first shot you said came from the outside and came from the corner of the house?

A. I don't know where it came from.

Q. Don't you remember testifying to that fact before the commissioner?

A. I don't think so, because I don't know where it came from; it was in that vicinity; that is all I know.

Q. How long had you known Roberts before this occurred?

A. I only went over there on the 17th of February; that is the time I got acquainted with him.

Q. What time was that?

A. The 17th of February.

Q. That would be about a month?

A. A month, lacking three days.

Q. Do you know where he came from?

A. I heard him say he came from Chicago.

Q. Did he come out there with a man named Green—did they come out together?

126 (Counsel for the Government objected to the above question for the reason that the same is incompetent, irrelevant, and immaterial.)

By the COURT: I will let him answer this question.

A. They did not.

Q. Isn't it a fact that Roberts was known in Chicago by the name of Parks?

A. I don't know that.

Q. You don't know that?

A. No, sir.

Q. How long had you known Green?

(Counsel for the Government objected to the above question for the reason that it is incompetent, irrelevant, and immaterial.)

By the COURT: Let him answer.

A. I met him on the 17th of February, in Skagway.

Q. These two generally ran what is called a "sure-thing" game?

A. They did not.

Q. He was the proprietor of a faro bank and owned an interest in it?

A. No, sir; Green was the proprietor.

Q. What did Roberts have to do with it?

A. I heard he had a working interest.

Q. How were you working, on salary or percentage?

A. On salary.

Q. You were simply the dealer?

A. I was simply the dealer.

127 Q. Ross, did you have any arrangement with the deceased to outfit you to go into the Yukon?

A. No, sir.

Q. Did you ever have any talk with him on that subject?

(Counsel for the Government objected to the above question for the reason that the said is incompetent, irrelevant, and immaterial. Objection overruled by the court.)

A. Roberts had no money; Green said that he would outfit Roberts, Brennan, and myself to go to the Yukon, and I told them that I would only go to prospect; that I had prospected a good deal in my life and that was the only was that I would go in there—to prospect; that was the only talk we ever had on the subject.

Q. Do you know who owns the Wonder Hotel—the building?

A. Well, I always heard a man by the name of Solmonson.

Q. He goes by the nickname of Sol, don't he?

A. Yes, sir; Sol or Solmonson.

Q. Do you remember of stating to him that this affair knocked you out of a summer's job?

A. I said it knocked my calculations all to pieces.

Redirect examination:

Q. State *state* to his honor the court and the gentlemen of the jury why you were afraid. Afraid of what? You stated that you were afraid at the preliminary examination to state what you saw.

A. I was afraid of the balance of the gang around there;
128 there had been several killings, and it was recognized that there was a gang of murderers and thieves in the town, and those arrested were not the only ones, and several fires had taken place, and for that reason I declined. I thought that a man that would kill a man for his money would kill one for less.

Dr. T. L. PRICE, called on behalf of the prosecution, being first duly sworn, testified as follows:

Examined by R. E. BENNETT:

Q. What is your name?
A. Dr. Thomas L. Price.
Q. Where do you reside?
A. Dyea.
Q. What is your business?
A. Physician and surgeon.
Q. Are you practicing at Dyea, Alaska?
A. Yes, sir.
Q. Did you see the body of Samuel Roberts on the morning of the 13th of March, this year?
A. No; I saw it in the evening.
Q. Describe what you found on the body, if anything?
A. I made an examination of the remains and found that a bullet
129 wound had been made in the body in the right bre'st—diagonally across the entire chest—penetrating the lungs and heart, and coming out back of the left shoulder.
Q. What was the cause of his death, if you know?
A. That bullet wound.
Q. That you have described?
A. Yes, sir.
Q. Did you find the bullet?
A. The bullet was presented to me by the marshal.
Q. Was that a revolver bullet that you saw?
A. Yes, sir.
Q. Did you see one William Corbett on the morning of the 13th of March, this year?
A. Yes, sir.
Q. State the circumstances under which you saw him.
A. I was called somewhere about three o'clock in the morning of the 13th to attend a man who had been shot, and I dressed and went to the Skategg saloon and found this man Corbett with a wound in his right bre'st, and I suggested that the proper place would be in the hospital, and had him taken to the hospital.
Q. Hadn't you previously heard shots fired that night?
A. I had not.

Cross-examination by Judge DELANEY:

Q. Dr., it is not a very unusual thing to hear shots fired, is it?
A. There is a good deal of shooting every evening.
Q. A good deal of shooting for the purpose of alarming people, isn't there, in the way of jokes, etc.?
130 A. Well, I believe so; yes, sir.
Q. You are conscious of that fact, are you not?
A. Well, I hear shots every once in a while; yes, sir.
Q. Now, in reference to this wound, will you please locate it a little more definitely, if you can, with reference to where the bullet—or what it was—penetrated the body.
A. It was about four inches and a half to the right of the nipple and

about an inch and a half or two inches above it; it was between the fourth and fifth ribs, if I remember correctly.

Q. Between the fourth and fifth ribs?

A. Yes, sir.

Q. Then it would fall a little below or a little behind the nipple; is that the idea?

A. It penetrated the right bre'st about four inches and a half to the right of the nipple and an inch and a half or two inches above.

Q. That would be, then, to the right; it would be back this way?

A. Yes, sir.

Q. About two inches, you say, above?

A. About two inches above.

Q. Where did it come out?

A. Back of the left shoulder.

Q. Back of the left shoulder?

A. Yes, sir.

Q. Was the bullet in the body when you made the examination?

A. It was not.

Q. Did the wound penetrate the whole trunk?

131 A. It did.

Q. There was no bullet there when you made the examination?

A. There was not.

Q. A hole on the opposite side, on the left shoulder?

A. On a line.

Q. I mean, there was a hole to indicate the ball must have come out?

A. Yes, sir.

Q. Did you probe the wound?

A. No; only with my fing*ure*.

Q. Did you open the body?

A. I did not.

Q. Then, the only way you have of tracing the direction of the wound is from external evidences?

A. Well, there was not sufficient to justify dissecting the body, because you could trace the bullet from the external wound.

Q. That is what I asked you; did you have any other evidences except the external evidences?

A. Only the use of my finger.

Q. When did you make this examination?

A. The evening of the 13th.

Q. About what time?

A. I suppose it was about 7 o'clock, possibly a little after.

Q. Where was the body then?

A. In the cabin belonging to the deceased.

Q. Who gave you this bullet?

A. The marshal had the bullet and handed it to me.

132 Q. Who?

A. Marshal Shoup.

Q. When?

A. That evening.

Q. Shoup, the marshal; ar'n't you mistaken in the man?

A. Not Shoup; I mean Snook, that is the man.

TERRY BRENNAN, called on behalf of the prosecution, being first duly sworn, testified as follows:

Examined by B. E. BENNETT:

Q. What is your name?
A. Terry Brennan.
Q. Where do you reside?
A. Sitka, at present.
Q. Where have you resided previously?
A. Montana.
Q. Where did you reside about the 12th of March, this year.
A. Dyea.
Q. Did you know Samuel Roberts in his lifetime?
A. I did.
Q. Do you know John Fitzpatrick, the defendant here?
A. I didn't know him at that time.
Q. Did you see Samuel Roberts on the 13th of March, this year?
A. I did.

Q. State what took place there.

133 A. I was working at the games with him there. When we got through that evening somewhere in the neighborhood of two o'clock.——

Q. Two o'clock in the morning?

A. Yes. I went to the stove and sit down and commenced reading a paper, and Roberts called me to the door and he says, "What are these lights burning over here in the foothills?" and I says I suppose they are people going inside, and he says, "Klondykers?" and I says I suppose so, and I went and sit down by the stove and resumed reading, and he asked Ross to go and get the sack and accompany him to the cabin, and Ross picked up the sack and started over with him, and in a few minutes I heard a shot and I started towards the door, and before I got to the door there was another shot, and when I got outside on the pavement there was another shot, and then I commenced to call to Sam. I called two or three times and didn't get any answer, and then I commence to call to Ross, and I didn't get any answer, and then I started towards the cabin, and there was two shots fired and I turned around and I fell.

Q. Whereabouts were the shots fired from?
A. On a line where I was.
Q. Coming from where?
A. About twenty feet—maybe fifteen feet.
Q. Do you know where Sam Roberts' cabin was?
A. Yes, sir.
Q. Was it from the cabin, or in that direction?
A. Yes, sir.

Q. Well, go on.

134 A. I ran back to the hotel and I asked them if they had a gun, and they passed me out an old gun in a canvass sack; then I said, that is all you got? and they said, yes; I ran upstairs and took a lantern that there was hanging at the head of the stairs and ran right straight across, and the crowd followed me over. I commenced calling again to Sam, and John Ross answered me and I went over and he was exhausted; he could

hardly speak, and I says, are you hurt? and he says, no; he says, I ain't hurt, but I guess they got Sam, and I says, I will go and find Sam, and I started towards the cabin; just as I got to the foot of the steps I found the money sack.

Q. In what condition was it, if you know?

A. Lying right where it fell at the foot of the steps.

Q. Had any money fallen out of the sack?

A. No; a fellow came up behind me and he picked up the sack and Ross commence' to hollo to him not to take the sack, give me the sack; and I says, John, that is all right; I says, I want to find Sam, and I walked along as slow as I could; it was impossible to see ten feet ahead of you; just as I got near to Sam I was holding the light in my left hand, like that, and my foot touched Sam and I saw him and I says, here he is, and I held the light over his face like that, and I says, do you know me, and he didn't answer me, and I stooped down on one knee and raised his head up with my right arm, and I says, he is dying, and I ran to get a doctor.

135 Q. Did you get a doctor?

A. I did.

Q. Now, when you first went over there did you hear anybody running away?

A. No, sir.

Q. Is this all you know of it, Mr. Brennan?

A. Yes, sir.

Cross-examination by Judge DELANEY:

Q. There were three shots fired, as I understand you, Mr. Brennan?

A. Yes, sir.

Q. And you went down there twice; that is, you made two different trips?

A. I did.

Q. The first time without any lantern?

A. Yes, sir.

Q. And on that trip you think you went up within fifteen or twenty feet of the cabin?

A. Yes, sir; maybe closer than twenty feet; I was very close to the cabin.

Q. In front of the door?

A. Yes, sir.

Q. Then two shots, that you mentioned as the last two shots, were delivered from the corner of the cabin or the door, as near as you could tell, or where?

A. I couldn't tell; they were on a line with me, I didn't stop. I saw the flash and my foot caught on a piece of timber and I fell.

136 Q. Then on the second trip you took the lantern?

A. Yes, sir.

Q. Was that all you heard—five shots—delivered before you started out on the second trip with the lantern?

A. Yes, sir.

Q. And the first three of these were delivered before you got to the cabin the first time?

A. Before I got off the sidewalk the first three were delivered.

Q Did you see anybody in the vicinity of the cabin on either trip that you could identify until you found Roberts and Ross?

A. I did not.

Q. When you went back with the lantern who went along with you, or shortly after you—this witness they call Brook?

A. The whole crowd followed me out; there wasn't one in the place that made a move until I went out with the lantern; they all followed me over after I started with the lantern.

Q. Then, after you got down there with the lantern near the step you found the sack?

A. I found Ross first.

Q. Whereabouts did he turn up?

A. It was about twenty or twenty-five feet from the cabin behind a pile of two by fours.

Q. On which side of the cabin?

A. Towards the water front, right-hand side.

Q. Looking at the cabin, on the right-hand side?

A. No; he was towards the water front.

137 Q. That would be east, wouldn't it?

A. I guess that would be east.

Q. Pretty nearly?

A. Pretty near east, I guess.

Q. About twenty-five feet away?

Q. Yes, sir.

Q. And the first time you went down and called to Ross or John and Sam; I suppose by Sam you mean Roberts?

A. Yes, sir.

Q. You didn't get any response at all?

A. I didn't get any answer from them; that is the reason I went over.

Q. I see. Now, when you got there with the lantern and Ross turned up you found the sack?

A. Yes, sir.

Q. This man Brook took possession of it, or undertook to take possession of it?

A. He picked it up; I says here's the sack, and he picked it up.

Q. Then Ross remonstrated?

A. He says, "Here, give me that sack;" and I says, "John, that is all right."

Q. And then after that you discovered the body?

A. Yes, sir.

Q. How was that lying with reference to the cabin, head or feet towards the cabin.

A. Feet towards the cabin.

Q. About how far?

138 A. About twenty feet from the cabin, maybe a little more. I couldn't tell exactly; it was in the dark there.

Q. You didn't discover it until your feet hit against the body as you were walking?

A. I did not.

Q. Now, with reference to that step and little platform that goes into the door w'ereabouts was Roberts' body—in front of the step or to the right or left of it a little?

A. It was lying pretty near on a line with the door of the cabin.
Q. Pretty near on a line?
A. Yes, sir.
Q. Had you been down to the cabin before that night, that you remember of?
A. No; I used to pack the sack over there with Roberts.
Q. You hadn't been over there on that night before the homicide occurred?
A. I might have been over there; they used to send me over there on errands occasionally.
Q. You don't remember distinctly whether you were there that same night before the shooting occurred or not?
A. No; I do not. I used to pack the sack over there and pack it back in the nighttime.
Q. How long have you known Ross?
A. I have known him for over twenty years.
Q. How long have you known Roberts?

139 A. Well, I have only known Roberts since last February, about six weeks previous to his death.

Q. About the time he opened those games, somewhere along there?
A. Yes, sir.
Q. Did you find Roberts' gun that night after you went down with the lantern?
A. No; it was lying over there and the money was discovered; it was lying close by, I didn't pick it up.
Q. You saw it?
A. Yes, sir.
Q. Do you know whether it was empty or loaded?
A. It was loaded; all the chambers; I didn't examine it until I had it afterwards, cleaning and greasing it.
Q. How long afterwards?
A. A night or two afterwards.
Q. Do you know who took the gun?
A. Green took the gun away.
Q. I mean from the ground, after you found Sam's body?
A. I do not.
Q. But Green subsequently turned it over to you?
A. He gave it to me afterwards.
Q. How long afterwards?
A. Two or three days afterwards. That is, a couple of days afterwards; he gave it to me on the 15th, I believe.

140 JOHN LEWIS BROOK, called on behalf of the prosecution, being first duly sworn, testified as follows:

Examined by B. E. BENNETT:

Q. What is your name?
A. John Lewis Brook.
Q. Where do you reside?
A. Dyea.
Q. Alaska?

A. Yes, sir.

Q. Did you know Samuel Roberts in his lifetime?

A. I knew him about two weeks before he died.

Q. Do you know John Fitzpatrick, the defendant here?

A. I have seen him several times.

Q. Did you see Samuel Roberts on the morning of the 13th of March, this year?

A. Yes, sir.

Q. Just state the circumstances under which you saw him and how you came to see him?

A. When I saw him he was just getting ready to go over to the house.

Q. Go on, and state the whole circumstances—how?

A. He walked out the house; I don't think he was gone two or three minutes, and I heard a shot, and I got up and ran out towards the place and I heard two more shots fired, and a man ran towards me and then turned around like that.

Q. What kind of a man was it; did you see him? discribe him?

A. A slight built man.

141 Q. How did you happen to see this man?

A. There was a light from the hotel—from the window—and there was a streak from there over to the corner, and I saw him probably three or four seconds.

Q. He was running away?

A. Yes, sir.

Q. Go on and tell what else you know.

A. I kept on going, and John Ross holloed out from a lumber pile alongside the house; he called for a lantern, and as I returned I passed Brennan in the street, already with a lantern, going towards there, and we found Roberts about fifteen feet from the steps dead; the money was lying about three or four feet from the steps.

Q. Then what did you do?

A. I picked up the money and was going in towards the cabin, and Ross wanted the money from me and I gave it over to him.

Q. Then what did you do?

A. We got several others from the hotel to come over, and we packed Roberts over to the hotel and I went down town for a doctor.

Q. Did you find Roberts' gun beside of him?

A. No, sir.

Q. Was it there at all?

A. No, sir; I saw it afterwards in the hotel.

Q. Where did the shots come from?

A. Straight towards us.

Q. Straight from the cabin?

142 A. They appeared to come from the door. I could see the front of the house, and I could see a dark opening right where the door is, and two shots came right out there.

Q. Right out of the door?

A. Yes, sir.

Q. This occurred in Dyea, Alaska?

A. Dyea, Alaska.

Cross-examination by Judge DELANEY:

Q. These last two shots were fired when you went down there with the lantern?

A. No; before that.

Q. Before?

A. Yes, sir.

Q. Did you go back to the hotel for the lantern?

A. I went back to the hotel; yes, sir.

Q. After the first time?

A. Yes, sir.

Q. How near did you get to the cabin?

A. We got within fifty yards, probably.

Q. Fifty yards. And then when these shots were fired you turned around and went back to the hotel?

A. We turned around and went back to the hotel.

Q. What is your business?

A. I am a sailor by trade.

Q. Were you ever on the steamer "Concord?"

A. I was.

Q. Did you desert?

143 (Counsel for the prosecution objected to the above question on the grounds that the same is incompetent, irrelevant, and immaterial, and for the further reason that the witness can not be compelled to incriminate himself.

Objection sustained by the court, to which ruling counsel for the defendant then and there duly excepted.)

Q. Where did you come from to Alaska?

A. Seattle.

Q. What was your name down there?

A. Brook.

Q. How long had you been at Seattle?

A. I was on the battle ship "Oregon" and we got transferred on to the "Concord" when the "Concord" came up here.

Q. What were you doing before you went on to the "Oregon"?

A. I came from Kansas.

Q. What was your name there?

A. Brook.

Q. What name did you enlist under?

A. John Brook.

Q. How long had you been in Dyea when this occurred?

A. I had been in Dyea for a month.

Q. How long have you been in Sitka on this trip this time?

A. We landed here on the 6th of May.

Q. Did you know a man confined in the jail by the name of Waugh?

A. I do—no I don't. I know a man by the name of Reilly.

144 Q. Did you have any conversation with him about this tri'l?

A. I don't think I did.

Q. Did you state to him that you expected to make a stake out of this affair, coming over here as a witness?

A. I don't think I did; no, sir.

Q. Don't you know whether you did or not?

A. I did not.
Q. Were you with Mr. Brennan when the body was found that night?
A. I was.
Q. How far was it from the door—the body?
A. Fifteen feet, probably; something like that.
Q. In front of the steps or to one side of the steps a little?
A. A little to the right.
Q. About fifteen feet away?
A. Yes, sir.
Q. Lying on his back?
A. Lying on his back.
Q. Feet towards the cabin?
A. Feet towards the cabin.
Q. Brennan found the body first; that is, got to it first?
A. Yes, sir.
Q. The first time you went down was there any call*ed* made by anybody for either Ross or Roberts?
A. I think there was; I thinks Brennan called for Ross and Sam.
Q. Whom?
145 A. I think Brennan called for Ross and Sam; he called something, I aint sure what.
Q. Did he get any answer?
A. I don't think he did.
Q. Prior to that time you heard three shots?
A. I only heard two.
Q. The last two?
A. I don't know whether they were the last two or not.
Q. That is the only two shots you heard?
A. Yes, sir.
Q. You don't know anything about the other shots?
A. Except the shots that caused me to run out and go over.
Q. How many shots did you hear*d* altogether?
A. Four.
Q. Where were you when you heard the first one?
A. In the hotel.
Q. Inside or out?
A. Inside.
Q. What did you do then?
A. I was sitting down watching a poker game.
Q. What did you do when the first shot was fired?
A. I jumped out and ran out. I was the first out of the building.
Q. Then what did you do?
A. I ran out across the street and Brennan behind me, and two shots were fired at me.
Q. That the only shots you heard?
A. Yes, sir.
Q. These three shots?
146 A. I heard one in the saloon before I jumped up.
Q. You ran out ahead and Brennan followed you?
A. Yes, sir.
Q. You heard two shots down there after you got pretty near the cabin?

A. One shot was fired and I jumped up and ran out to the street.
Q. Two shots were fired before you got out and started from the Wonder Hotel?
A. Yes, sir.
Q. That is all the shots you heard?
A. Yes, sir; I heard one shot about fifteen minutes afterwards. We had Roberts inside.
Q. That was after you got into the house?
A. Yes, sir.
Q. Did you go a doctor?
A. We did.
Q. Who went with you?
A. Terry Brennan and two boys from the hotel. I went downtown with the lantern.
Q. What doctor did you get?
A. I didn't get no doctor at all.

Redirect examination:

Q. You say you know Walter Reilly in the jail?
A. Yes; I got acquainted with him since he has been in the jail.
Q. Do you know whether Blackett is his attorney?
A. I do not.

147 Recross-examination.

Q. What were you doing in Dyea?
A. After Sam Roberts got killed they employed me in the house.
Q. What were you doing at the time of the homicide?
A. I was going to Lake Bennett.
Q. What were you doing, anything?
A. Nothing.

LEROY W. TAYLOR, called on behalf of the prosecution, being first duly sworn, testified as follows:

Examined by B. E. BENNETT:

Q. What is your name?
A. Leroy W. Taylor.
Q. Where do you reside?
A. Dyea.
Q. What is your business?
A. I am working for the Olympia Hotel Company.
Q. What is your business?
A. I am clerking there now.
Q. Were you clerking there on the evening of March 13th, this year?
A. I was night watchman at that time.
Q. Did you know Sam Roberts in his lifetime?
A. I did not.

148 Q. Do you know the Roberts cabin?
A. Pretty near.
Q. Do you know the Wonder saloon?
A. Yes, sir.
Q. How far is the Wonder saloon from the Olympia Hotel?

A. Two blocks.
Q. Do you know the defendant, John Fitzpatrick?
A. I do *not*.
Q. Were you in the Olympia Hotel about three o'clock, in the hotel.
A. I was in the street beside the hotel.
Q. What time?
A. I was there all night.
Q. Between two and three, state what took place?
A. I saw a man run up the street right opposite to where I was; he went over to a lumber pile and then joined two other men on the other side of the lumber yard, and they continued on up the street the other side of the lumber yard.
Q. Had you previously heard shots?
A. Yes, sir; I did.
Q. Whereabouts were they from?
A. South, in the direction of the Wonder Hotel saloon.
Q. How many shots did you hear?
A. I couldn't say for sure—three or four altogether.
Q. How soon after these shots did you see these three men?
A. A short time—two or three minutes possible; a few minutes; I couldn't say for sure.

149 Q. Can you describe any of these men?
A. I could not.

Q. Was one a small or large man?
A. I couldn't say.
Q. Did they come from the direction of the Wonder saloon and Roberts' cabin?
A. Yes, sir; they came from that way.
By Mr. BENNETT. Take the witness.
By Judge DELANEY. I don't want him.

PHILLIP BALLARD, called on behalf of the prosecution, being first duly sworn, testified as follows:

Examined by Mr. B. E. BENNETT:

Q. What is your name?
A. Phillip Ballard.
Q. What is your business?
A. Regular soldier.
Q. Whereabouts were you stationed on or about the 13th of March, this year?
A. Dyea.
Q. What was your duty, if any, at that time on the morning of the 13th?
A. Guard duty.
Q. Were you on guard duty?
A. Yes, sir.

150 Q. Did you hear shots fired along about two o'clock that morning?
A. Yes, sir.
Q. How many did you hear?
A. Four—four or five.
Q. Did you know where the Wonder Hotel or saloon is in Dyea, Alaska?

A. No, sir.

Q. Do you know where the Roberts cabin is there?

A. No, sir.

Q. Do you know now?

A. Not exactly; I was told about where it was.

Q. Now, from what direction did you hear these shots?

A. They sounded to be south from where I was.

Q. Is that where you have since learned that Roberts' cabin and the Wonder saloon is?

A. In that direction.

Q. Now, state what took place, if anything, after the shots were fired that you saw or observed.

A. Well, there was a man came to me; I was in the cabin, and he rapped at the door and I went and opened the door for him, and he said he would like to get a doctor, he was shot.

Q. How long after firing the shots was it, would you say?

A. Well, it was fifteen or twenty minutes, or half and hour, I couldn't tell.

Q. Well, what did you do?

A. I directed him to the hospital in town and he went that way.

151 Q. Who was this man?

A. Well, I was told afterwards it was——

(Counsel for the defendant objected to the witness stating what he was told.)

Q. Did you find out afterwards who it was?

(Counsel for the defendant objected to the above question as not proper. Objection overruled by the court, to which ruling counsel for the defendant then and there duly excepted.)

Q. Who did you find out afterwards this man was?

A. Well, they told me the man's name was Corbett.

(Counsel for the defendant moved to strike out the last answer of the witness on the grounds that the same is hearsay testimony.)

By the COURT. No, that is not hearsay testimony; we often get the identity of a man by what somebody tells us his name is; I will not strike it out.

(Counsel for the defendant then and there duly excepted to the ruling of the court.)

By Mr. BENNETT. I will ask that William Corbett be brought into court.

By the COURT. Bring up Corbett, Mr. Marshal.

Q. About what time in the morning was this that this man applied to you for assistance?

A. Well, it was somewhere between two and four o'clock. I didn't have no timepiece with me; I couldn't tell the time any more than guess at it.

152 Q. You didn't look at the clock to find out?

A. No, sir.

(The defendant, Corbett, having been brought into court by the marshal, the court ordered him to stand up, which he did, and the examination of the witness continued, as follows:)

Q. Is that the man that applied to you?

A. I couldn't say that it was for sure.

Q. What is your best judgment?

A. Well, I saw the man in the dark; it was in front of the cabin and there was only a candle light in the cabin; he came there about a minute; that is the first time I ever saw the man in my life; I couldn't say that it was the same man that was there or not.

Q. Now, state what is the best of your judgment.

(Counsel for the defendant objected to the above question for the reason that the witness has already answered the question, and has stated that he could not state.

Objection overruled by the court, to which ruling counsel for the defendant then and there duly excepted.)

A. Well, I would say that it seems to resemble the man a little; he was standing in the court room when they called me up and they asked me if I could recognize him. I said no, I couldn't; he was standing with his arm done up; when I saw him he was a strong, healthy looking man.

Q. Did you find out where he was wounded when he applied to you?

153 A. He said he was shot in the shoulder.

Q. This man you see in the court room now, was he shot in the shoulder?

A. I don't know whether he was or not.

Q. How large was the man that applied to you—tall, or not very tall?

A. Not very tall; a shorter man than me.

Q. About the size of this man Corbett?

A. Something like that.

Q. State to his honor the judge and the jury what is your best opinion as to whether it was Corbett or not.

A. I aint formed any opinion, but from what everybody else told me, it was the man.

Q. Did you testify before the grand jury?

A. Yes, sir.

Q. What was your testimony there?

A. I testified there a man came to me; they asked me if it wasn't Corbett, and I told them it resembled him; they said, "Then you know it was Corbett," and I didn't tell them that *it* thought it was at all; they wanted to have me say that; they said it for me, so I let them have it at that.

Q. (By the COURT.) Mr. Witness, answer that question, whether that is the man that applied to you that evening; whether it was or was not, to your best judgment.

By Judge DELANEY. That is under an objection.

By the COURT. The objection will be overruled.

(To which ruling counsel for the defendant then and there duly excepted.)

154 A. Well, I should say it was, to my best judgment.

Cross-examination by Judge DELANEY:

By Judge DELANEY. Before proceeding with the cross-examination I desire to move to strike out all the testimony of this witness on the ground that it does not in any manner contribute in any manner to the identification or guilt of the defendant Fitzpatrick, now on trial.

(Motion overruled by the court, to which ruling counsel for the defendant then and there duly excepted.)

Q. On the night that the application was made to you, you didn't know the man?

A. No, sir.

Q. And I understand you now to testify that, in your judgment, it was Corbett, in response to the question propounded by the court?

A. That is the best of my judgment.

Q. Now, I want to know if that judgment is made up from what you know of Corbett or what has been said to you by outside parties?

A. Well, I don't exactly understand you.

Q. Is that opinion or judgment that you have now just stated formed from what you know of Corbett personally, or is it formed from what you have been told by other parties?

A. Well, it is formed from both.

155 Q. So that of your own knowledge you are not willing to swear that the man who applied to you that night was the Corbett that was just in the court room?

(Counsel for the prosecution objected to the above question as incompetent, irrelevant, and immaterial.

Objection overruled by the court.)

A. I wouldn't want to swear that is the same man. I only seen him for a minute, and didn't see him for a month afterwards; it was in the dark and I couldn't possibly swear it was the same man.

By Judge DELANEY. I would like to ask this witness whether any threats were made to him on behalf of the prosecution here, concerning his evidence here.

By Mr. BENNETT. No objection, your honor, to that question.

By the COURT. Go on.

Q. Has the district attorney, or deputy marshal, or any officers of the Government threatened you in any manner about your testimony?

A. No, sir.

Q. I understood you to say that the grand jury tried to get you to swear that the man that you saw there at your post was this man Corbett?

A. Well, they asked me if that wasn't the man, and if that was not Corbett, and I had already told them I couldn't exactly swear that it was, and they said, well, his name is Corbett, wasn't it, so I let them go at that.

156 Q. You didn't answer that one way or the other?

A. No; they started to tell me something else and I didn't answer.

Dr. T. L. PRICE, recalled on behalf of the prosecution, and testified as follows:

Examined by B. E. BENNETT:

Q. Doctor, I believe you testified heretofore; please state to the court and jury about what time it was on the morning of the 13th of March, 1898, that William Corbett applied to you for medical assistance.

A. Somewhere about three o'clock.

Q. Whereabouts was he wounded?

A. In the right shoulder.

Q. How long was he under your attendance?

A. Three weeks or about a month; I don't remember the exact time.

(Counsel for the defendant moved the court to strike out all of the last testimony of the witness Price, on the ground that it does not affect the defendant on trial.

Motion overruled by the court, to which ruling counsel for the defendant then and there duly excepted.)

157 CHARLES DOLL, called on behalf of the prosecution, being first duly sworn, testified as follows:

Examined by B. E. BENNETT:

Q. What is your name?

A. Charles Doll.

Q. Where do your reside?

A. In Dyea.

Q. Alaska?

A. Yes, sir.

Q. What is your business, Mr. Doll?

A. My last business was teamster.

Q. How long have you been living at Dyea, Alaska?

A. Since about the first of February.

Q. Have you been engaged in teaming the most, if not all, of that time?

A. Part of the time I was stable boss.

Q. For whom?

A. Dock Cleveland.

Q. Whereabouts were you on the evening of the 12th and the morning of the 13th of March, this year?

A. I was going home from my work.

Q. About what time was that?

A. About 12 o'clock.

Q. State what occurred, if anything?

A. My usual way to go home was past the Wonder Hotel. I used to go down the street past the Olympia, and there was a cabin standing about a hundred yards, may be a little over——

158 Q. Do you know whose cabin that is?

A. No, sir.

Q. Do you know now?

A. Only what I heard. And I seen two men standing in the door and partly on the platform.

Q. Who were these men?

A. Mr. Fitzpatrick were one.

Q. How did you *pahhen* to recognize him standing in the door there?

A. I was just going past and looked up to see who lived there, and I flashed my light.

Q. You recognized him?

A. Yes, sir.

Q. The same man that is here?

A. Yes, sir.

Q. Was that right opposite the Wonder saloon?

A. Yes, sir.

Q. Do you know whether it is known as the Roberts cabin?
A. I don't know.
Q. Do you know where the killing took place?
A. Yes, sir.
Q. Is this cabin right where the killing took place?
A. Yes, sir.
Q. When they saw you, did they dodge back into the house?
A. No, sir.
Q. Did they opened the dook to look out?
A. I' was opened.
159 Q. A little open or how much?
A. Must have been altogether open.
Q. You passed right along?
A. Yes, sir.
Q. Then said nothing to you?
A. No, sir.

Cross-examination, by Judge DELANEY.

Q. What time of night was this?
A. About twelve, or ten minutes past twelve.
Q. You had a lantern?
A. Yes, sir.
Q. What kind of a lantern?
A. A good lantern.
Q. Not a bull's-eye?
A. No, sir.
Q. And ordinary lantern carried in the hand and lights in all directions?
A. Yes, sir.
Q. Which hand did you have the lantern in?
A. In my left hand.
Q. Where did you come from?
A. I came from the hotel.
Q. What hotel?
A. The Wonder Hotel.
Q. Where is that?
A. On Second street.
Q. What direction with reference to the Wonder Hotel and this
160 cabin?
A. The Wonder Hotel is here and the cabin in that direction.
Q. And you came then from the Wonder Hotel?
A. Yes, sir.
Q. About 12 o'clock at night?
A. Yes, sir.
Q. Where had you been before that?
A. I was over to the stable.
Q. Where is that with reference to the Wonder Hotel?
A. Just behind it about a block, pretty near.
Q. About a block behind it?
A. Yes, sir.
Q. What was your business?
A. Stable boss.

Q. For whom?
A. Dock Cleveland.
Q. Where were you going?
A. I was going home.
Q. Whereabouts do you live?
A. I live on Third and River streets.
Q. Which way from the Wonder Hotel?
A. In a southeast direction.
Q. How far?
A. About two blocks and a half.
Q. About two blocks and a half from the Wonder saloon?
A. Yes, sir.
Q. Was there anybody with you?
A. No, sir.

Q. How long have you known Fitzpatrick?
161 A. I don't know as I ever saw him before; I might have seen him, but not to my knowledge.

Q. That night is the first time you ever saw him to know him?
A. To my knowledge.
Q. Who was with him?
(Counsel for the prosecution objected to the above question for the reason that the same is incompetent, irrelevant, and immaterial. Objection overruled by the court.)
A. I can't think of his name, now; I have seen him; his name is——
Q. Brooks?
A. Brooks; yes, sir; I think that is his name.
Q. Did you see him, too?
A. Yes, sir.
Q. And the two men were standing in the door?
A. Yes, sir.
Q. And the door was open?
A. Yes, sir.
Q. And they were facing the Wonder saloon?
A. Yes, sir.
Q. And you came from the Wonder saloon with a lantern?
A. Yes, sir.
Q. Straight across over to that cabin?
A. Yes, sir.
Q. Plain sight; anybody standing in the door would see your lantern?
A. Yes, sir.

162 Q. When you got there these two men were standing in the door?
A. Yes, sir.
Q. Did you speak to them?
A. No, sir.
Q. You held your lantern up and looked at them, and you are willing to swear one of these men were Fitzpatrick?
A. Yes, sir.
Q. And the other was Brooks?
A. Yes, sir.
Q. Where did you live before coming to Dyea?

A. Skaguay.
Q. What were you doing there?
A. Yard boss for the Kerry Lumber Company.
Q. Where did you live before going there?
A. Seattle.
Q. What did you do there?
A. Different businesses.
Q. What?
A. Lumber business.
Q. What else?
A. Firing.
Q. Did you know Cudihee, the deputy marshal?
A. I knew of him.
Q. Did you know of him in Seattle?
A. No, sir.
Q. Where did you know him first?
A. The first time I saw him he subpœnaed me.
163 Q. You have been playing a kind of professional witness for the police officers and detectives?
A. I should say not.
Q. Did you go home that night?
A. Yes, sir.
Q. Where did you go the next morning?
A. I was sick the next morning.
Q. Did you get up that day to go to the stable?
A. No, sir.
Q. When did you go out next?
A. Monday morning.
Q. What day of the week was this you saw these men?
A. Saturday night.
Q. A dark night?
A. Not very.
Q. Moonlight?
A. Well, the moon shown' out amongst the clouds occassionally.
Q. Starlight?
A. I couldn't say for certain.
Q. What time of night was it?
A. I said about ten minutes past twelve, to my best knowledge.
Q. After you got home did you hear any shots?
A. I did.
Q. What time was it?
A, I couldn't say for certain what time it was.
Q. Did you get up?
A. No, sir.
Q. Look out of the door or window?
A. No, sir.
164 Q. You remained in your cabin all the next day?
A. Yes, sir.
Q. You are sure that the cabin door was opened when you passed by there?
A. Yes, sir; I am.

Q. And you are sure that Brooks and Fitzpatrick were both there?
A. Yes, sir.
Q. When did you next see Fitzpatrick?
A. On the hearing.
Q. Before Oystrander?
A. Yes, sir.
Q. How did you identify him?
A. Well, I could identify him by his clothes he wore.
Q. That all?
A. Yes, sir.
Q. How was he dressed?
A. A yellow mackinaw suit.
Q. How was the other one dressed?
A. Dark clothes.
Q. A dark-colored mackinaw suit?
A. One had on a mackinaw and the other had a dark suit on.
Q. And the mackinaw was yellow?
A. Yes, sir.
Q. That is the only way you had of identifying him?
A. Yes, sir.
Q. There were a great many people wearing those mackinaws about that time?
165 A. Quite a few. Fitzpatrick had on a leather belt and a buckle in front.
Q. Was it a buckle?
A. It must have been.
Q. A good many people had on yellow mackinaws with a leather belt and buckles, didn't they?
A. Some of them did.
Q. Isn't it a fact that kind of clothings was worn a good deal up there about that time?
A. Oh, yes.
Q. You identified Fitzpatrick by this yellow mackinaw, that is all?
A. And by seeing him also.
Q. Did you identify him by anything else besides the yellow mackinaw suit and the buckle?
A. By seeing him.
Q. Where?
A. In the door of the cabin.
Q. Did you see his face?
A. Yes, sir.
Q. That is the first time you ever saw him?
A. The first time I ever saw him, to my knowledge.
Q. When did you first tell about this?
A. One of the teamsters, when he came home Sunday night, told me about the shooting; that is the first time I knew it.
Q. Then you told him?
A. I told him what I had seen in the door.
166 Q. What is the teamster's name?
A. I forget his name.
Q. Did you tell him who the men were?

A. I didn't know them by name.
Q. What has become of this teamster?
A. He was in Dyea when I left.
Q. He slept in the cabin with you?
A. Yes, sir.
Q. You don't know his name?
A. I forget his name.
Q. Was he working for the same company?
A. He was.
Q. Was he there when you came home that night or in the morning?
A. He was in the bed when I got home.
Q. Did he go away in the morning?
A. He was working Sunday.
Q. Sunday you didn't work?
A. I was sick in bed.
Q. He went to work?
A. Yes, sir.
Q. You didn't go out until Monday?
A. No, sir.
Q. It was Sunday you told the teamster?
A. Sunday night.
Q. Did you ever talk with Cudihay, the deputy marshal, about this?
A. No, sir.
167 Q. Never had any conversation with him?
A. No conversation; except what men have.
Q. I mean about this case?
A. No, sir.

Redirect examination:

Q. You was—this was in the morning; that is, about ten minutes after twelve, the morning of the 13th of March of this year?
A. Yes, sir.
Q. Did you recognize the hat that Fitzpatrick had on?
A. Yes, sir.
Q. What kind of a hat was that?
A. He had a fur cap on.
Q. He had a fur cap on at the hearing, did he?
A. Yes, sir.
Q. The same cap he had on on the 13th, when he was in the doorway there?
A. Yes, sir.
Q. You told you' fellow teamster about meeting them after you heard of the killing, did you?
A. Yes, sir.
Q. When Cudihey subp*oncad* you, you told him you had seen two men down there also, didn't, you?
A. Yes, sir; I told him.
Q. Then you testified to it at the hearing?
A. Yes, sir.
Q. And before the grand jury?
A. Yes, sir.

168 JOHN CUDIHEE, called on behalf of the prosecution, being first duly sworn, testified as follows:

Examined by B. E. BENNETT:

Q. What is your name?
A. John Cudihee.
Q. What is your business?
A. At present deputy United States marshal at Dyea.
Q. Alaska?
A. Yes, sir.
Q. Did you know Samuel Roberts in his lifetime?
A. Well, I just knew him, that was all.
Q. Do you know this defendant here, John Fitzpatrick?
A. About the same, just to know him.
Q. Do you know where Robert's cabin is?
A. Yes, sir.
Q. About the 13th, or 14th, of March, this year?
A. Yes, sir.
Q. Describe what you found there, if anything, relating to this matter.
A. I was in Skaguay that morning—that is the morning the homicide occurred—and Big Stewart, a Norwegian, came over about five o'clock and awoke me up and I went over there and found this man Roberts dead in his cabin.
Q. Over to Dyea?
A. Yes, sir; it was half past eight o'clock when I got over there; and I went around town and inquired of different parties if they
169 knew anything about the matter and that evening I arrested Mr. Kelly or Fitzpatrick.
Q. What name did he go under there?
A. Kelly.
Q. Any other name attached to it?
A. None that I know of. And Brooks, I arrested Brooks and locked them up that night; myself and Mr. Snook—in the meantime during the evening I found out that Corbett was in the hospital and I went to the hospital to have a talk with him and he was in bed sick and didn't feel like talking; he didn't say much and I placed him under arrest at the same time.
Q. Go on and state what you did that is material in this case.
A. That is about all that was done until the next day; we summoned a jury and held a coroner's inquest, and a good many witnesses in the neighborhood came and testified before the coroner's inquest.
Q. Did you look over the cabin that morning?
A. Why, yes; I looked around the cabin and then later I came back to the cabin, along about, I think, about 12 o'clock. I was there in the morning of my arrival from Skaguay; my attention was called to some tracks that was around there; then I went over to Kelly's and Corbett's cabin.
Q. They lived together, did they?
A. They did at that time.
Q. State what you did.

A. I went and opened the cabin and found a lot of shoes and clothing all covered with blood.

170 Q. Have you those clothes here?

A. Yes; I have got the shoes here.

Q. Have you the clothes here?

A. No.

Q. Pick out the shoes [two shoes handed to the witness].

A. There is one of two pairs, and there is one.

Q. Are those the shoes that you found there?

A. Yes, sir.

Q. Which one is Fitzpatrick's, if you know?

A. These are.

Q. How do you know that?

A. He identified them himself in my office. He said that one was Corbett's.

(Counsel for the prosecution offered the shoes in evidence, and asked to have the same marked as Exhibits 1 and 2.

Counsel for the defendant objected to the introduction of the shoes in evidence on the grounds: First. That the same have not been sufficiently identified. Second. Any testimony in relation to Corbett is improper on this trial.

Objection overruled by the court, to which ruling counsel for the defendant then and there duly excepted.)

Q. That is blood stains on there?

A. It is supposed to be; it showed much plainer then.

171 Q. Now, is this Corbett's shoe?

A. Yes, sir.

Q. Is there blood on there?

A. It looks like it.

Q. It was plainer when you first got it?

A. Yes, sir.

Q. Now, what is there peculiar about that shoe?

A. That fitted the track in the rear of this cabin.

Q. State what you did after you got the shoe.

A. We took them down to the cabin.

Q. What cabin?

A. Robert's cabin.

Q. What did you do?

A. This shoe fitted the mark in the rear of the cabin [the witness indicates the shoe which he identified as Corbett's shoe].

Q. Describe the mark first.

A. Well, the size and length, width and nails all fitted; there was quite a number present there; I think Mr. Daly was present, and there was several others.

Q. Describe the footprint first.

A. Well, it was in the sand at the corner of the building.

Q. What kind of a footprint was it, if you know?

A. A footprint made with a shoe of that kind, I should think.

Q. Any holes made in the sand?

A. An impression of the whole shoe.

Q. What kind of an impression?

A. A hole right in the sand; that is all.

172 Q. Any nail marks there?

(Counsel for the defendant objected to the above question as leading.

Objection sustained by the court.)

A. There was; looking at that shoe print, there was these nail' prominate in front where the heel is worn off'; we put the shoe in there, and there was a half a dozen there that saw the same as I did.

Q. What did you see?

A. That shoe looked as if it made that mark in the sand in the rear of the building.

Q. Did it fit the print in the sand?

A. It did; yes, sir.

Q. How did it fit it?

A. The shoe was set into it.

Q. Did it fit it perfectly, or not?

(Counsel for defendant objected to the above question as leading.

Objection sustained by the court.)

Q. State anything you know about the fitting of this shoe into the footprint.

A. I say it did; yes, sir. The heel was worn off and the mark was about the same in the sand.

Q. Now, when did you discover that mark?

A. Why; my attention was called to that in the morning between half past eight and nine o'clock, when I first came over.

Q. What did you do, if anything, when you discovered it?

173 A. I covered this mark in the sand up with a piece of tin oil can.

Q. What was the condition of the mark after you covered it up?

A. Exactly as I left it: nobody saw me do this at all.

Q. How did these nails fit into the holes in the sand, if they fitted at all?

A. Well, the impression in the sand looked very much as if it was made by that shoe.

Q. Did you fit this shoe into the impression?

(Counsel for the defendant objected to the above question as leading.

Objection overruled by the court, to which ruling counsel for the defendant then and there duly excepted.)

A. I did; yes, sir.

Q. Did it fit nail holes and all with the worn-off end of the shoe?

A. Well, I suppose it fitted.

Q. Dit it fit?

A. Yes, sir.

(Counsel for the defendant moved the court to strike out all of the testimony of this witness with reference to the shoe of Corbett, on the grounds that it can not affect this defendant.

Motion overruled by the court, to which ruling counsel for the defendant then and there duly excepted.)

174 Q. Describe to hos honor, the judge, and the jury the cabin as it was when you found it when you went there the next day or that same day—the cabin of Roberts?

A. Well, I found Roberts' body in the cabin dead; that is about all.
Q. Did you examine the door at all?
A. I did; yes, sir.
Q. What did you find, if anything?
A. There was nothing about the door that I remember, but there was a table.
Q. Now, while we are at the door, was there a lock upon it?
A. There was a lock upon the door.
Q. Describe the lock?
A. I don't remember how it was.
Q. Was it locked or unlocked.
A. The door was not locked while I was there.
Q. Was there a casing around the door?
A. Yes, sir.
Q. Describe that, please.
A. Well, there was a bullet mark in the casing and also on the table—a little table standing between the window and the door, and there was a mark where the bullet went through the table and struck the casing of the door.
Q. Did you see anything else about the casing?
A. I didn't notice.
Q. (By a JUROR.) I would like to know if the bullet mark was on the inside or outside of the casing?
A. Inside.
175 Q. How about the curtain? Describe that.
A. The curtain; it was cut, I should judge, about an inch and a half on top and then ripped down about four or five inches at the top of the curtain. The curtain didn't cover the whole window; it was just about halfway.

Cross-examination by Judge DELANEY:

Q. I understand you to say that is the shoe that was represented to you as belonging to this John Fitzpatrick?
A. Yes, sir.
(By Judge DELANEY.) Stick your foot up here, Fitz.
(The defendant John Fitzpatrick complied with the request of his counsel, and counsel compared the shoe with the defendant's foot.)
Q. And there was blood marks on it, so called, when you got it?
A. Yes, sir.
Q. Whereabouts were these blood marks [counsel hands the shoe to the witness]?
A. Now, there is one right there and another there, and there is another there.
Q. I suppose when you testify these are blood marks you mean to testify they look like it?
A. Yes, sir.
Q. You wouldn't testify positive they were?
A. No, sir.
Q. That couldn't be determined except by a chemical analysis?
A. No, sir.
Q. You mean to say they look like it?
176 A. Yes, sir; that is what I intended to say in the first place.

Q. Now, after you got over from Skaguay to Dyea, after hearing of the death of Roberts, did you go immediately to the cabin?

A. No, sir.

Q. Where did you go first?

A. I went to my office up town.

Q. And from there, where?

A. I went to several places. I had other business to attend to there.

Q. You didn't begin to investigate this immediately?

A. I did; yes, sir.

Q. You started in, then, to investigate this matter as soon as you got there?

A. Yes, sir.

Q. What time of the day was it when you went over to the cabin? I mean the Roberts cabin.

A. About half past eight o'clock in the morning, or nine.

Q. What time did you get over to Dyea?

A. About half past eight.

Q. You must have went pretty soon after you got there.

A. The cabin is near the beach.

Q. Where did you go to first?

A. I went to the cabin.

Q. I understand you to say you went to the office first?

A. No, sir; I went over with the partner of the man who was killed; he was on board of the steamer "Queen"—Harry Green—and I went went over with him.

177 Q. To the Roberts cabin?

A. Yes, sir.

Q. Did you begin your investigation first on the outside or the inside of the house, do you remember?

A. Well, no; I don't remember which was first.

Q. You don't know whether you went inside first?

A. I went inside first to see the body, to see if I recognized him.

Q. Now, as I understand it, the door to this cabin stands at the left as you face it; that is, it stands in the left corner facing the cabin?

A. Yes, sir.

Q. And it swings to the left as you go in?

A. Yes, sir.

Q. And the window is at the right of that?

A. Yes, sir.

Q. Where'bouts was this table standing that had the bullet hole in it?

A. Under the window.

Q. Beside where the door swung back?

A. Yes, sir.

Q. Close up against the wall?

A. Yes, sir.

Q. Was there anything on the table?

A. Nothing that I saw.

Q. Was it about the size of this table [indicating to the witness the table at which the reporter sat]?

A. It might have been two by three feet.

178 Q. Whereabouts was the bullet mark in the table?

A. Well, as near as I can remember it was on one side, pretty

near the center of the table, but on the side closest to the window a few inches; the table stood lengthwise in front of the window.

Q. In front of the window and about the center of the table lengthwise, and a little to the right of the center of the table, toward the window?

A. Yes, sir.

Q. About how far from the window or the end of the table next to the window?

A. The bullet hole was in the side, near the center of the table, but closest to the window.

Q. Now, where the *the* bullet hole on the door casing?

A. Well, it looked to me as though that bullet struck the casing of the door.

Q. On the right-hand side of the door as you go in?

A. On the right-hand side as you go in.

Q. About how high from the floor?

A. I don't remember; perhaps six inches or eight inches, something like that.

Q. And the bullet hole in the table, was that on the top of the table?

A. It went right through the table.

Q. On an angle, slanting?

A. Yes, sir.

Q. Did you examine particularly the bullet hole in the door casing with a view to get the direction of that bullet?

179 A. No; I did not.

Q. You couldn't say whether that went in obliquely also, like the pistol was pointed down, except as you saw the bullet hole?

A. Yes, sir.

Q. About how far from the floor was it?

A. Six or eight inches; I don't distinctly remember; something about like that.

Q. What was the direction, if you know, of that bullet with reference to the inside or outside of the house, if you can tell; did it indicate as though it was fired from the inside, or was the direction of the bullet such as to indicate that it was fired from the outside?

A. No, sir; it looked as if it was fired from the inside.

Q. Now, what kind of a curtain was that at the window?

A. Well, it was a common window curtain—pretty well worn.

Q. These ordinary shades they have hanging around; that what you mean?

A. Yes, sir.

Q. But it didn't reach to the top of the window?

A. No, sir.

Q. How far up was it stuck on?

A. I think about two-thirds the way up the window.

Q. This curtain was cut for how long a space?

A. Four or five inches by an inch or an inch and a half wide.

Q. Was it cut out or was it simply gashed to enable one to see out, or was there a piece taken out of the curtain?

A. It was cut on the top and then cut down the sides and the piece was hanging.

180 Q. So the piece taken out would fall down?
A. Yes, sir.
Q. Still attached to the curtain and fell down?
A. Yes, sir.
Q. That hole would be about how big?
A. Well, it was about an inch and a quarter or inch and a half wide, and four or five inches long up and down.
Q. Longer up and down than the other way?
A. Yes, sir; the longest way up and down.
Q. Who first called your attention to the shoe tracks?
A. I think it was a man by the name of Carpenter; he had what they called the Log Cabin Saloon.
Q. Was he down there with you?
A. Yes, sir.
Q. How big a party did you have there that morning?
A. I didn't have anybody but myself.
Q. How many were around there?
A. When I first went there there was nobody but myself and Green.
Q. After investigating the inside you went out to look around the outside?
A. Yes, sir.
Q. Was anybody there besides you and Carpenter and Green at the time you discovered the tracks?
A. Yes, sir.
Q. A good many people crowded around there?
A. Yes, sir.
181 Q. When you came out on the outside your attention was called to this track?
A. Yes, sir.
Q. Now, with reference to this track. What part or what direction, or point adjacent to the cabin was it?
A. It was ——
Q. In front or behind?
A. Behind the southeast corner.
Q. And to the rear of the cabin?
A. Yes, sir.
Q. Did you observe any more than one impression?
A. No, sir.
Q. That was the one to which you tested this shoe?
A. Yes, sir.
Q. And after discovering the track you covered it up with a piece of tin?
A. Yes, sir.
Q. Who was by when the track was s'own you except Green that saw it?
A. Mr. Ross, Mr. Daly; the proprietor or the man that called my attention to it—Hamilton, I think that is his name—and Mr. Jerry Brennan; there was that many anyway.
Q. They had gathered around there while you investigated the inside of the cabin?
A. No, sir; that was after I had gone down the second time.

Q. What time of the day was it that you went to the Fitzpatrick and Corbett cabin?

A. It was about two o'clock on the following day—on the 14th,
182 I think; that was the time I got these shoes; I made the arrest on the evening, about 11 o'clock, of the 13th.

Q. The evening of the 14th you visited the Fitzpatrick and Corbett cabin?

A. Yes, sir.

Q. Who was there?

A. Nobody.

Q. Was the door open?

A. No, sir.

Q. Was the door locked?

A. Yes, sir.

Q. Had you arrested Fitzpatrick at that time?

A. Yes, sir.

Q. Where did you find him when you arrested him?

A. My partner arrested him.

Q. Mr. Snook arrested Fitzpatrick?

A. Yes, sir.

Q. Do you know where he was when he was arrested?

A. Yes, sir.

Q. Where was he?

A. He was in the saloon called the Comique.

Q. What time of the day was he arrested?

A. About eleven o'clock.

Q. Who got the key to the cabin, you or Snook, to this Fitzpatrick and Corbett cabin?

A. I didn't get any key.

Q. Wasn't it locked?

A. No, sir.

Q. You went there the afternoon of the 14th and got these shoe'?

A. Yes, sir.

183 Q. What did you do then?

A. Well, I took the shoes down and looked over the situation, and I took them back to my office and I brought Fitzpatrick up to my office, which is about a half a mile from where the jail was situated at that time, and told him I was through his cabin and I found some shoes, and I asked him if they were his shoes, and he said, yes, that is my shoe; and I says, who owns the other one, and he said, that is Corbett's.

Q. At your office or your house?

A. My house and office, too.

Q. They are together, are they, in one building?

A. Yes, sir.

Q. Now, when you first went over to the cabin and investigated on the outside, looking for evidence, as I presume, as you had a right to be, you made a pretty thorough search of the ground, didn't you, all around there?

A. Yes, sir.

Q. And the only mark that you have been able to do anything like identifying is the one at the southeast corner—the impression from this shoe?

A. No; because prior to this I found several things in there.

Q. In the investigation that you made on the outside of the cabin at the time you went there, did you find any other marks that would correspond to this shoe?

A. No, sir.

Q. What was the character of the ground about the cabin, soft
184 and capable of making an easy impress?

A. Yes; damp sand.

Q. Is that the case for a considerable distance around the cabin?

A. Yes, sir.

Q. And the same character of soil from there right across to the Wonder Hotel?

A. Yes, sir.

Q. And, as I understand it, you didn't take the Corbett shoe up there until after both the shoes had been identified by Fitzpatrick; until after you saw him about the shoes?

A. No; I took the shoes there before they had been identified.

Q. You did?

A. Yes, sir.

Q. And tried them as to the mark?

A. Yes, sir.

Q. And afterwards you went down and saw Fitzpatrick?

A. Yes, sir; took him up to my office.

Redirect examination:

Q. While you were examining Fitzpatrick's cabin what else did you find there?

A. Oh, there was a lot of provissions and a lot of tools, and one thing and another.

Q. What kind of tools?

A. Augers and knives, axes, pickaxes.

Q. Did he have any burgler tools there?

A. There was some kind of tools there; I don't know whether
185 they were burgler tools or what they were.

Q. Did you find any keys?

A. Yes, sir.

Q. What kind of keys?

A. I don't know what kind of keys they were; just common door keys.

(Counsel for the defendant moved the court to have all of the testimony of the redirect examination stricken out, for the reason that it is in no way connected with this case; that the defendant is not indicted for the crime of burglery.

Motion overruled by the court; to which ruling counsel for the defendant then and there duly excepted.)

Q. You say the bullet hole was as if the ball had been fired from the inside of the cabin towards the outside?

A. Yes, sir; it went through the table, I should judge by the hole in the table, and struck the casing of the door.

Q. Where would you say the man was standing who fired the bullet, in relation to the door and window, taking the hole in the table?

A. It looked as if he stood off——

Q. Facing the door?

A. Facing the door; yes, sir.

Q. And as if he was firing from the inside of the cabin toward the door, also?

A. Yes, sir.

186 Q. Now, in regard to that footprint, what position would you say the man was in when he made that footprint?

A. He sit on a pile of lumber at the southeast corner of the building, facing north, and he could look right around the corner of the building.

Q. Toward the Wonder saloon?

A. Toward the Wonder saloon; yes, sir.

Q. What was the appearance as to the making of it?

A. It looked as if the person who made that footmark was in waiting for somebody; that is the way it looked to me.

Q. Did I understand you to say you didn't see a knife mark on the casing near the lock?

A. There was something of that kind; yes, sir.

Q. State to the court and jury, if you now remember, did it look as if the door had been opened with a knife or something of that kind?

A. Yes; it was a good lock; a spring lock.

Recross-examination:

Q. Now, what kind of a lock was it on this door, Mr. Marshal?

A. It was a good spring lock.

Q. What do you mean, a night latch?

A. Yes, sir.

Q. Catch on the inside, and had to be unlocked on the outside with a key, or night key, as we call it?

A. Yes, sir.

A. Yes; I see. Now, do you mean to testify that the footprint there, at the corner of the house, looked as though somebody was

187 lying in wait; is that your testimony, or don't you want to be understood as testifying that way?

A. No; I don't know as I do want to testify that way; I want to testify to the facts of the case.

Q. That was only your opinion?

A. That is all.

Q. Your opinion is the party that was there was sitting on the pile of lumber?

A. Yes, sir.

Q. With his foot on the ground when this imprint was made?

A. Yes, sir.

Q. Only one imprint?

A. Yes, sir; only one.

Q. The imprint of one foot?

A. Yes, sir.

Q. Which way was that impression pointing with reference to the cabin?

A. It was pointing right north.

Q. Towards the cabin?

A. At the northeast corner of the cabin, and was pointing towards the cabin; he was sitting about 18 inches, I should judge, 14 or 18 inches; and it looked as if he had one foot on a piece of board and facing towards

the corner of the cabin, and the other foot made the mark right beside of this board.

Q. Which way was the toe?

A. Facing north.

Q. That would be towards the cabin or not?

A. Yes, sir.

188 Q. I don't just get on to your last statement concerning the bullet marks inside there. Was this table standing in the center of the room?

A. No, sir; not when I saw it.

Q. It stood over here, out from the corner and between the corner of the room and the door?

A. Yes, sir.

Q. And under the window?

A. Yes, sir.

Q. Whereabouts was this bunk or bed?

A. It was in the southeast corner of the building.

Q. The southeast corner of the building?

A. Yes, sir.

Q. That would be the corner of the room diagonally across from the door?

A. Yes, sir.

Q. And the table stood at the foot of that?

A. Yes, sir.

Q. And you say the bullet mark from the table looked as if the ball had come from the direction of the foot of the bed?

A. Yes, sir.

Q. And the bullet mark in the casing of the door was on the right-hand side as you go in?

A. Yes, sir.

Q. And from the appearance as you describe it to the jury—I believe you illustrated it in some way that it looked as though these two marks were made by one and the same bullet?

189 A. Yes, sir.

Q. Did you find that ball?

A. I found one bullet; I didn't find it, somebody else picked it up and handed it to me.

Q. The one that made this mark?

A. I don't know.

Q. The bullet that you refer to as having found is the one taken out of Roberts's clothes?

A. That was one, and there was another one picked up in the room.

Q. (By JUROR). I want to know if there was any blood marks inside of the cabin or outside of the cabin?

A. I said both inside and out; there was a pile of blood outside and then inside, too.

Q. Now, you testified on your direct examination about there being blood marks, or what resembled blood marks, in Fitzpatrick's and Corbett's cabin.

A. Yes, sir.

Q. A good deal of it?

A. Yes, sir.

Q. Scattered around on different things?
A. Yes, sir.
Q. Aside from the clothes you found?
A. Yes, sir.
Q. Those you didn't bring?
A. No, sir.
Q. There were other marks in and about the cabin?
190 A. Yes, sir.

Redirect examination:

Q. Did you examine to see whether or not there were any blood-spots around the corner of the cabin?
A. I did; yes, sir.
Q. What did you find?
A. I didn't find any; no, sir.
Q. Roberts' body was in the cabin when you examined it?
A. Yes, sir.
Q. Was it bleeding some then?
A. Yes, sir.
Q. You saw blood there?
A. Yes, sir.
Q. Blood on the table?
A. Blood on the table; and it had run off on to the floor to some extent.

Recross-examination resumed:

Q. As a matter of fact, these hobnail shoes are worn*ed* a good deal in and about Dyea, and have been for the past few months?
A. Yes, sir.
Q. A great many people wear them now?
A. Yes, sir.

191 JOHN K. ROSS, recalled by the defendant for further cross-examination.

Examined by Judge DELANEY:

Q. I don't remember whether I asked this question, and in order to make sure I desire to ask the following: Mr. Ross, on the examination before the commissioner, in response to the following question, "From what direction did the shots from the outside come?" did you answer as follows: "I couldn't tell. I think I was stunned when I fell off the step. The last two shots were fired by the man standing in the doorway and shooting across the street in that direction." Did you testify substantially as I have read at the examination on that point?
A. Yes; I did.
Q. Now, in reference to one other question; in reference to the identification of the man you testified to having seen on the doorstep, in response to the question by the prosecution, the question is as follows: "Can you state what impression you received from what you saw there—that is, in reference to the man on the step?" Your answer was, "He was a short man. I got that impression from seeing him jump off the step." Did you so testify?
A. Yes, sir.

Redirect examination by Mr. BENNETT:

Q. I think you did tell his honor the judge and the gentlemen of the jury the reason you testified so.

A. I did. I was afraid of my life; I was afraid of being murdered.

192 Counsel for the prosecution, having no further evidence to offer in support of the indictment, rested the case on behalf of the Government.

Whereupon the defendant in his behalf offered the following proofs:

JOHN FITZPATRICK, called in his own behalf, being first duly sworn, testified as follows:

Examined by Judge DELANEY:

Q. Mr. Fitzpatrick, you are the defendant now on trial?

A. Yes, sir.

Q. Can you tell the jury where you were on the night of the 12th of March from about 11 o'clock in the evening until the next morning?

A. I was up between Clancy's and Kennedy's. I had been in Clancy's up to about half past twelve or one o'clock. About one o'clock, I guess, I went up to Kennedy's and had a few drinks with Captain Wallace and Billy Kennedy, and I told them I was getting kind of full and I was going home, and along about quarter past one Wallace brought me down as far as Clancy's, and then he took me down to the cabin and left me in the cabin, and we wound the alarm clock and set it to go off at six o'clock, and I took off my shoes and laid down on the bunk and woke up at six o'clock in the morning and went up the street.

193 Q. Now, is the Kennedy and Wallace that you refer to the witnesses that are mentioned in the affidavit of Corbett and Brooks for a continuance? You heard the affidavit read.

A. Yes, sir.

Cross-examination by B. E. BENNETT:

Q. How long have you resided in Dyea, Mr. Fitzpatrick?

A. I went there about Christmas, I guess; just about Christmas.

Q. What was your business while you were there?

A. I was working for William Kennedy and for the Wilson boys, putting fences on lots.

Q. How long did you work at that?

A. Oh, about a couple of weeks, I guess; something like that.

Q. Do you know who runs the Skaget saloon?

A. Yes, sir.

Q. Who is it?

A. Bailey and Alger.

Q. Did you ever work in there?

A. Yes; I worked around the games a little. I never worked for Bailey and Alger until I worked for Kennedy.

Q. What was Kennedy's business?

A. Gambling.

Q. What is called the sure thing gambling?

A. No, sir.

Q. Did you push for the games?

A. No, sir.

Q. You were doing what?

A. He bought a lot down beside the Dyea Hotel, and I worked mostly clearing this lot.

194 Q. Have you ever been arrested before?

(Counsel for the defendant objected to the above question, for the reason that the same is improper.

Objection sustained by the court.)

Q. Have you ever been convicted of any crime, amounting to a felony and a misdemeanor, involving moral *turpitude*?

A. No, sir.

Q. Who roomed with you in the cabin there?

(Counsel for the defendant objected to the above question, for the reason that the cross-examination of the witness must be confined to the points brought out in the examination in chief, and under the rule counsel is not allowed to go outside of the substance of the testimony on which the witness was interrogated.)

By the COURT. No; of course he could not go outside of the substance of the examination in chief, but the examination in chief covers the entire period in which the crime charged to have been committed, and the defendant testified as to his whereabouts during the time mentioned, and the prosecution has a right to go into anything that would affect his credibility as a witness or that might contradict or impeach his testimony as to his whereabouts and what he was doing that night and

195 those who were associated with him. The objection is overruled.

(Counsel for the defendant then and there duly excepted to the ruling of the court.)

A. William Corbett, when he was home.

Q. Do you know where Henry Brooks roomed in Dyea?

A. Not that night; no. He stopped with us a while after he came out of the Yukon, he and his brother. Four of us was stopping there. He staid there a while and then moved to the Skaget Hotel. He was going over to Bennet.

Q. You were not boosting for the games?

A. No, sir.

Q. What time did you go home that night?

A. About half past one, or somewhere along there.

Q. Did Corbett come in before or after you?

A. Corbett wasn't there; I didn't see Corbett.

Q. Do you remember the time you got up?

A. Six o'clock, about.

Q. Did you notice any blood in the room when you got up?

A. No, sir.

Q. Were you wearing in March the same shoes you have got on now?

A. I have had these shoes since last summer.

Q. Were you wearing them on the 12th day of March?

A. I think I was.

Q. Will you swear you were?

A. I couldn't swear whether I did or not. I generally did about town, and when I went away I wore gum boots.

196 Q. To the best of your knowledge, did you have those shoes on?

(Counsel for the defendant objected to the above question as not proper cross-examination.)

By the COURT. I think the objection is well taken; I think I will sustain that.

Q. Did you have shoes or boots on that night?

(Counsel for the defendant objected to the above question as not proper cross-examination.)

By the COURT. As to whether he had any on at all, I will allow him to answer that.

(Counsel for the defendant then and there duly excepted to the ruling of the court.)

A. I don't know; I didn't wear boots only very seldom.

Q. Did you have on the same suit you have on now?

(Counsel for the defendant objected to the above question as not proper cross-examination. Objection overruled by the court, to which ruling counsel for the defendant then and there duly excepted.)

A. No; I may have had the same pants on.

Q. Do you remember what kind of a suit you did have on?

(Counsel for the defendant objected to the above question as not proper cross-examination. Objection overruled by the court, to which ruling counsel for the defendant then and there duly excepted.)

A. Well, I don't know that evening what I had on for sure.

197 Q. Did you have the same hat on that night that you have now in your hands?

(Counsel for the defendant objected to the above question as not proper cross-examination. Objection overruled by the court, to which ruling counsel for the defendant then and there duly excepted.)

A. I guess I did.

Q. In your opinion, you did?

A. I think I had this hat here.

Q. Have you a fur cap also?

(Counsel for the defendant objected to the above question as not proper cross-examination. Objection overruled by the court, to which ruling counsel for the defendant then and there duly excepted.)

A. No, sir.

Q. You have never owned a large fur cap, then?

A. Yes, I have owned one, but I gave it to a man by the name of Joseph McVerry, who borrowed it from me.

Q. Did you have that fur cap or was it borrowed during the month of March of this year?

(Counsel for the defendant objected to the above question for the reasons, first, that it is not proper cross-examination; second, it must be confined to a time prior or at the time of the alleged homicide.)

198 By the COURT. On that ground I will sustain the objection it must be confined to the time of the alleged homicide or prior thereto.

A. Not that I know of.

(Counsel for the defendant duly excepted to the ruling of the court, in regard to the ruling of the court on the first ground of the objection.)

Q. Do you think you would know if you did have it?

A. I guess I would know everything that belonged to me.

Q. Still you don't remember whether you had it or not?

A. No, sir.

Q. Your memory is bad?
A. No, sir.
Q. Is it good?
A. Pretty good.
Q. Did you have it, or do you remember now?
A. I tried to tell you the cap didn't belong to me; it was a borrowed cap.
Q. How long did you have it in your possession?
A. Oh, I don't know exactly.
Q. How long would you say?
A. Well, I don't know.
Q. Well, about how long?
A. About a week, I guess.
Q. Was that about the time the homicide took place?
A. Yes, sir.
Q. About that time?
199 A. Yes, sir.
Q. About the time the homicide took place did you have a mackinaw suit with a large belt and buckle?
(Counsel for the defendant objected to the above question as not proper cross-examination. Objection overruled by the court, to which ruling counsel for the defendant then and there duly excepted.)
A. There was a belt, but I never used the belt.
Q. Answer the question. (The last question was read by the reporter.)
A. Yes, sir.
Q. Did you wear it about that time, also?
A. Well, I had to change it around; I didn't wear it every day in the week; when I wasn't working I wore this suit.
Q. Were you working on the 12th of March, this year?
A. Yes, sir.
Q. Who for?
A. Wilson and Kennedy.
Q. What were you doing for them?
(Counsel for the defendant objected to the above question as not proper cross-examination. Objection overruled by the court, to which ruling counsel for the defendant then and there duly excepted.)
A. I was to take stuff up the trail.
Q. When you were arrested did you have this fur cap on?
A. Yes, sir.
200 Q. Did you have it on at the preliminary examination?
A. Yes, sir.
Q. Did you have this mackinaw suit on on the 12th and 13th days of March of this year?
A. I don't know what day I got arrested; that day, or whatever day I got arrested, I had it on when I was arrested.
Q. Had you been wearing it for some time previous?
A. Yes; considerable that winter.
Q. Had you worn it, you think, a week or two weeks previous, right along?
(Counsel for the defendant objected to the above question as not proper cross-examination. Objection overruled by the court, to which ruling counsel for the defendant then and there duly excepted.)

A. I told you I had been working all along since I came up here, on and off.

Q. Do you remember whether or not you had it on on the 12th of March of this year?

A. I don't know.

Q. Do you remember what kind of a coat you did have on, if any?

A. I had three coats, a canvass coat, this one, and a mackinaw coat.

Q. Do you remember which you had on that day?

A. No, sir.

Q. You were working on the 12th?

A. Yes, sir.

Q. That is the coat you generally wore when you were working?

201 A. No, sir.

Q. Which one?

A. The mackinaw or canvass coat.

Q. Which one generally?

A. Generally the mackinaw.

Q. Do you remember putting on the canvass coat on the 12th of March?

A. I don't know; I don't know which coat I had on.

Q. Have you rubber boots?

A. Yes, I have got rubber boots.

(Counsel for the defendant objected to the above question and answer for the reason that the same is not proper cross-examination. Objection overruled by the court, to which ruling counsel for the defendant then and there duly excepted.)

Q. Do you remember whether or not you had rubber boots on on the 12th of March of this year?

A. I answered you that before.

Q. (By the COURT). Answer again.

A. I don't know; I don't know what I had on.

Q. Are you positive that you were with Kennedy and Wallace on the night of the 12th of March of this year?

A. Yes, sir.

Q. Please explain to his honor, the judge, and the gentlemen of the jury how it is that you remember that so well and still have no remembrance of what you wore, from your hat to your boots?

202 A. Kennedy came down to the place, after he heard the evidence of this man Doll—Kennedy came down to the jail and told me he was sure that I was with him, and he told me he would come over here to the trial.

Q. You don't remember anything about it yourself; only from what they told you?

A. No; I know of going in there.

Q. You remember that yourself?

A. Yes, sir.

Q. You remember the day?

A. Yes, sir.

Q. The same day—the same night?

A. The next night I was in jail.

Q. Did this Kennedy and Wallace remember having been with you at the hearing in the court below?

A. I wanted to introduce the witness there before and Ostrander told us it would do no good, but that he would hold us to the district court.

Q. I will ask you if they were present.

A. I didn't have a chance to call anybody.

Q. Were they there present?

A. No, sir; nobody appear that we brought up there.

Q. Did you notice any shoes of Corbett's when you got home that night?

A. I don't know; I didn't notice anything.

Q. Did you notice any shoes of his when you got up the next morning in the cabin?

A. No, sir.

203 Q. How long have you know' William Corbett?

(Counsel for the defendant objected to the above question as not proper cross-examination.)

By the COURT. What is the object of the testimony, Mr. Bennett?

Mr. BENNETT. The object, if the court pleas', is to test the credibility of the witness.

By the COURT. I will overrule the objection for the present.

(Counsel for the defendant then and there duly excepted to the ruling of the court.)

A. I have known him four or five years; something like that.

Q. You say you didn't notice any shoes the next morning?

A. No, sir.

Q. Did you notice any shoes of his from the time you got up the next morning until you were arrested?

A. Notice any shoes?

Q. Yes; belonging to him.

A. No, sir; not that I know of.

Q. Do you know whether he had a pair of shoes with nails in the bottom of them?

(Counsel for the defendant objected to the above question as not proper cross-examination. Objection overruled by the court, to which ruling counsel for the defendant then and there duly excepted.)

A. Yes; he had a pair of shoes.

Q. When did you first notice any blood in the cabin?

204 A. When we went up to pack my clothes to come over here.

Q. Did you observe the shoes offered in evidence here yesterday?

A. Yes, sir.

Q. Were they ever in your cabin?

A. No.

Q. Did you notice that one with the nails in the bottom of it?

A. I seen it.

Q. Did Mr. Corbett have shoes something like that?

(Counsel for the defendant objected to the above question as not proper cross-examination. Objection sustained by the court.)

Q. When you got up on the morning of the 13th, where did you first go?

A. I went to Clancy's.

Q. When did you first see Corbett?

(Counsel for the defendant objected to the above question as not proper

cross-examination. Objection overruled by the court, to which ruling counsel for the defendant then and there duly excepted.)

A. I seen him in the hospital.

Q. That same day?

A. In the evening.

Q. How came you to go to the hospital?

205 (Counsel for the defendant objected to the above question as not proper cross-examination.

Objection sustained by the court.)

Q. On the 13th day of March of this year, and previous thereto, did you own a revolver?

(Counsel for the defendant objected to the above question as not proper cross-examination.)

By the COURT: No, I don't think myself that that would go to the appearance or discription of the witness at all. Objection is sustained.

Q. The next morning when you went to Clancy's saloon, did you give him your pistol?

(Counsel for the defendant objected to the above question as not proper cross-examination.

Objection sustained by the court.)

Q. When you went to Clancy's saloon, did you have any conversation with him in regard to Corbett?

(Counsel for the defendant objected to the above question as not proper cross-examination.)

By the COURT: The objection is sustained for the reason that it is not an impeaching question in the form that the prosecution would be allowed to ask if it was for the purpose of impeachment.

Q. How long did you stay in Clancy's saloon?

(Counsel for the defendant objected to the above question as not proper cross-examination.

Objection sustained by the court.)

206 Q. Whereabouts did you go from Clancy's saloon—where was the next place you went?

(Counsel for the defendant objected to the above question as not proper cross-examination.

Objection sustained by the court.)

Q. How long after the morning of the 13th before you saw Henry Brooks?

(Counsel for the defendant objected to the above question as not proper cross-examination.

Objection sustained by the court.)

Q. Did you see William Corbett on the evening of the 12th of March of this year?

(Counsel for the defendant objected as not proper cross-examination.

Objection overruled by the court, to which ruling counsel for the defendant then and there duly excepted.)

A. Yes, sir.

Q. Whereabouts were you on the evening of the 12th—say from five to ten o'clock, or in that neighborhood?

A. Well, until about half past seven I was in the cabin and then went uptown.

Q. Was Corbett with you in the cabin?
A. No, sir; he came down there before I went up town—he didn't go up town with me.
Q. Did you see him in the cabin?
A. In the early part of the evening?
Q. Yes.
207 A. About seven o'clock, I guess.
Q. Did you have on that fur cap at the time, if you remember?
(Counsel for the defendant objected to the above questions as not proper cross-examination.
Objection sustained by the court.)
Q. Do you remember what kind of shoes Corbett had on that evening?
(Counsel for the defendant objected to the above question as not proper cross-examination.
Objection overruled by the court, for the reason that the question goes to test the memory of the witness; to which ruling counsel for the defendant then and there duly excepted.)
A. I don't know what kind he had on; I don't know what kind he has got on now.
Q. Did you see Corbett again that evening?
A. No, sir.
Q. Did you have a gun with you that evening?
(Counsel for the defendant objected to the above question as not proper cross-examination.
Objection sustained by the court.)
Q. Did you see Henry Brooks that evening?
A. Yes, sir.
Q. Do you remember what time you saw Henry Brooks?
A. About seven o'clock, I guess.
Q. Where was he—in the cabin?
A. He came down there with Corbett.
208 Q. Was anybody else in the cabin that evening, that you saw, besides these two men?
(Counsel for the defendant objected to the above question as not proper cross-examination.
Objection overruled by the court; to which ruling counsel for the defendant then and there duly excepted.)
A. No, sir.
Q. Did you see Brooks in the cabin after that time?
A. No, sir.
Q. Did you see Corbett in the cabin after that time?
A. No, sir.
Q. Who were at the cabin first—you, or Brooks or Corbett?
A. Brooks and Corbett were out, and I was lying down on the bed.
Q. How long was it before you went out after they went out?
A. I couldn't sleep; I laid there a while and got up and went up town about half past seven or eight o'clock, I guess.
Q. Where did you say you went when you went up town?
A. Up around Clancy's and Kennedy's.
Q. How long were you in Clancy's that evening?
A. Oh, I guess about three or four hours; I guess something like that;

between eleven and twelve o'clock, between there and Kennedy's; about one o'clock or half past I was playing black jack in Clancy's.

Q. Where is Kennedy's place in relation to Clancy's, across the road?

A. Up town.

209 Q. How far apart are they?

A. 'Bout three hundred yards.

Q. Were you in any other place besides these two that evening?

A. Well, I didn't generally go into any other place in town. I might drop in and come out again; there was a whole row of places.

Q. What time did you say you went home that night?

A. About one or half past one; some time along there.

Q. Have you a watch?

A. No, sir.

Q. How do you know it was half past one?

A. By the alarm clock, and Kennedy told me, and I says it is getting late and I am going down home, and Wallace says I will go down with you, and we left Kennedy's and went to Clancy's, and I asked Wallace for another drink and we went in and got a bottle for in the morning, and both of us went down to the cabin together and had a drink, and Wallace went home and left me there about half past one.

Q. Do you know where the Roberts cabin is in Dyea?

A. Only as it was pointed out to me.

Q. Do you know where the Wonder saloon is?

A. Yes, sir.

210 (Counsel for the defendant offered in evidence a callendar for the month of March, of the present year of 1898, as it appears in Ayers' American Almanac.

Counsel for the prosecution objected to the introduction in evidence of the same, on the grounds that it is incompetent, irrelevant, and immaterial and has nothing to do with the rising of the moon in this latitude, and for the further reason that it does not pretend to give any information as to the rising or setting of the sun or moon in this latitude.

Objection overruled by the court, and the calendar admitted in evidence and is as follows:)

Third Month. **MARCH 1898.** **31 Days.**

MOON'S PHASES.

	Salt Lake. D. h. m.	S. Diego. D. h. m.	S.Fr'isco. D. h. m.	Victoria. D. h. m.
Full M.	8 2 2 M.	8 1 40 M.	8 1 20 M.	8 1 16 M.
Last Q.	15 0 21 M.	14 11 59 A.	14 11 39 A.	14 11 35 A.
New M.	22 1 10 M.	22 0 48 M.	22 0 28 M.	22 0 24 M.
First Q.	30 0 13 M.	29 11 51 A.	29 11 31 A.	29 11 27 A.

CALENDAR For B.C., Washington, Oregon, Montana, and Idaho.

CALENDAR For California, Nevada, Utah, Arizona, and Mexico.

Sun Slow.

D. M.	D. W.	Miscellaneous Phenomena.	☾'s pl. Const.	Sun rises. h. m.	Sun sets. h. m.	Moon sets. h. m.	— m.	Sun rises. h. m.	Sun sets. h. m.	Moon sets. h. m.
1	Tu	St. David. W. D. Howells b. 1837.	♓	6 39	5 47	2 44	12	6 32	5 53	2 13
2	We	□♄☉. Dakota a territory, '61. *Snow*	♈	6 37	5 48	3 30	12	6 30	5 54	3 1
3	Th	Freedman's bureau established, 1865.	♈	6 35	5 50	4 9	12	6 29	5 56	3 42
4	Fri	☌♅. First U. S. congress, 1789. *or*	♉	6 34	5 51	4 41	12	6 27	5 57	4 18
5	Sat	Gov. F. T. Greenhalge d. 1896. *rain.*	♉	6 32	5 53	5 9	12	6 26	5 58	4 51
10) 2d Sunday in Lent. Venus in Aquarius. 11h. 24m. Day's length. 11h. 35m.										
6	*Su*	☿ gr. hel. lat. S. Gen. Sheridan b.'31.	♉	6 30	5 54	5 31	11	6 24	5 59	5 19
7	Mo	♁ stat. Florida admitted, 1845.	♊	6 28	5 55	5 52	11	6 23	6 0	5 45
8	Tu	8. *Purim.* *Hard*	♊	6 26	5 57	rises	11	6 21	6 1	rises
9	We	♂♃☌; □♆☉. Mazarin d. 1661.	♋	6 24	5 58	8 3	11	6 20	6 2	7 54
10	Th	Great fire in Boston, 1893.	♋	6 22	6 0	9 20	10	6 18	6 3	9 6
11	Fri	Charles Sumner d. 1874. *frost.*	♌	6 20	6 1	10 38	10	6 17	6 4	10 18
12	Sat	First Pa. assembly, 1683.	♌	6 18	6 2	11 53	10	6 15	6 5	11 28
11) 3d Sunday in Lent. Mars in Capricornus. 11h. 47m. Day's length. 11h. 51m.										
13	*Su*	♂♁☾. Pocahontas d. 1617.	♌	6 16	6 3	morn	9	6 14	6 5	morn
14	Mo	14. ♂♄☌; ☾ in perigee.	♌	6 15	6 5	1 5	9	6 12	6 6	0 36
15	Tu	15. Maine admitted, 1820.	♍	6 13	6 6	2 9	9	6 11	6 7	1 39
16	We	☿☌☉ sup. Bat. Pound Gap, 1862.	♍	6 11	6 7	3 0	9	6 9	6 8	2 31
17	Th	☾☊. St. Patrick. *Squally.*	♍	6 9	6 8	3 41	8	6 8	6 9	3 17
18	Fri	Grover Cleveland b. 1837.	♎	6 7	6 10	4 13	8	6 6	6 10	3 55
19	Sat	♂☌♂. Yale College founded, 1700.	♎	6 5	6 11	4 39	8	6 5	6 11	4 27
12) 4th Sunday in Lent. Jupiter in Virgo. 12h. 10m. Day's length. 12h. 9m.										
20	*Su*	☉ enters ♈. Spring begins.	♏	6 3	6 13	5 3	7	6 3	6 12	4 56
21	Mo	♄ stat. Seb. Bach b. 1685.	♏	6 1	6 14	5 25	7	6 1	6 13	5 25
22	Tu	22. ♂☿☌; ♂♀☌.	♐	5 59	6 15	sets	7	6 0	6 14	sets
23	We	Bat. Winchester, 1862. *Chilly.*	♐	5 57	6 17	8 21	7	5 58	6 15	8 7
24	Th	Behring Sea arbitration, 1893.	♑	5 56	6 18	9 29	6	5 57	6 16	9 9
25	Fri	♅☉; ☿☊. Annunciation.	♑	5 54	6 20	10 36	6	5 55	6 17	10 12
26	Sat	♂☿♀. Beethoven d. 1827.	♑	5 52	6 21	11 37	6	5 54	6 18	11 10
13) 5th Sunday in Lent. Saturn in Scorpio. 12h. 32m. Day's length. 12h. 27m.										
27	*Su*	Riots in Cincinnati, 1884. *Chinook*	♒	5 50	6 22	morn	5	5 52	6 19	morn
28	Mo	♂♆☌; ☾ in apogee.	♒	5 48	6 23	0 33	5	5 51	6 19	0 4
29	Tu	29. John Tyler b. 1790.	♓	5 46	6 25	1 22	5	5 49	6 20	0 53
30	We	30. ☿ in perihelion. *wind.*	♓	5 44	6 26	2 4	4	5 48	6 21	1 37
31	Th	☾♁. *Currer Bell* d. 1855.	♓	5 42	6 27	2 40	4	5 46	6 22	2 16

Physician: "You lie awake in bed three or four hours every night? That is bad. I shall have to treat you for chronic insomnia." *Caller* (whose salary is $14 a week): "Er—no, doctor; I don't think it's as bad as that. I simply can't sleep."

A man has been known to go in rhapsodies over the scent of roses, yet sit for half an hour eating onions. Man is versatile, even in tastes.

The best that can be said of some foolish people is that they are useful as an example to others.

"When you hear a man blowing about how he wouldn't stand any nonsense from his wife," says the Manayunk Philosopher, "the chances are ten to one that he's the very man who would weaken first."

Author: "I think I have a good idea for a detective story." *His Wife:* "What is the idea?" *Author:* "I will have the detective trace an umbrella to its original owner."

"Does candidate Kinx keep his promises of reform?" asked the new resident. "I guess he must keep 'em," replied the well-known citizen; "we don't see nothin' of 'em."

211 EDWARD DEGROFF, called on behalf of the defendant, being first duly sworn, testified as follows:

Examined by Judge DELANEY:

Q. Do you know the difference in time between Sitka and San Francisco, approximately?

A. I can not say that I do.

Q. The difference in time between Sitka and San Francisco time, approximately.

A. Not of my own knowledge; no, sir.

Q. Do you know at all?

(Counsel for the prosecution objected to the above question as incompetent, irrelevant, and immaterial and for the reason that the witness said that he did not know of his own knowledge.)

By the COURT. I don't suppose anybody knows of their own knowledge, except by knowing the distance and computing it; the witness can answer the question.

A. My knowledge of it, I suppose, comes from what we understand about the arrival and departure of steamers here.

Q. From that, what is the difference of the time?

A. I understand it to be about fifty-five minutes between here and Portland.

Q. Then, approximately, what would it be at San Francisco?

A. Well, it might be four or five minutes more.

Q. Somewhere about an hour—about sixth minutes?

A. Yes, sir.

212 Cross-examination by B. E. BENNETT:

Q. State if you know what time the sun rose in San Francisco on the 13th of March of this year.

A. I haven't the least idea what time the sun arose.

Q. Or the moon, I mean.

A. On the moon, either one.

Q. Do you know whether or not it arose shortly after 11 o'cloc' on the evening of March 12, 1898?

A. Only what I saw in that almanac.

By the COURT: The almanac is the best evidence.

A. I saw it in the almanac similar to that; a lot of them are hanging up in the store there. I picked one up and looked at it.

Q. Do you mean to tell the jury from what knowledge you have the moon rose shortly after eleven o'clock?

A. To the best of my information.

(Counsel for the defendant offered to read in evidence from volume 10 of the American Encyclopaedia, on page 437, concerning the velocity of light, the statement therein contained as submitted to the court for inspection, and that this offer is made under Title 2 on page 561 of the 1st volume of the Oregon Code, being the act of October 11th, 1862, and now a part of the laws of Alaska, and paragraph 8 of said act. The
213 same being admitted in evidence without objection, was read to the jury as follows:

"Calculations from data furnished in this way show the velocity of light to be about 190,000 miles per second."

Counsel for the defendant offered to read to the jury that portion of the affidavit of Corbett and Brooks filed herein upon the application to continue the cause over the term, for reference as to the whereabouts of the said Brooks on the evening of the 12th and the morning of the 13th of March last under the admission appearing of record made by the district attorney.

Counsel for the prosecution objected for the reason that the same is incompetent, irrelevant, and immaterial, and particularly so in regard to Fitzpatrick, the defendant herein.

Objection overruled by the court for the reason that the theory of the prosecution is that the three defendants, whose names are put in the one indictment, had assembled at the house of the deceased with the unlawful purpose of committing a robbery, and the homicide occur'ed at that time, and they have introduced testimony to show or attempted to show that these men referred to in the affidavit were present, and the further reason that counsel has admitted that the witnesses if present in
214 the Corbett case would testify to that state of facts.

The portion of the affidavit was admitted in evidence by the court and read to the jury as follows:

"Your affiant, Brooks, expects to prove by the witness' Alger, Stevens, Wallace, Bailey, and Kennedy that he, the said Brooks, was at the Skagit Hotel from nine thirty o'clock p. m. of the evening of the 12th of March, 1898, to after three o'clock a. m. of the morning of the 13th of March, 1898, being at said hotel during the hours and dates fixed in said indictment herein charging said Brooks with the crime of murder; that he, the said Corbett, expects to prove by the said witness' Alger, Stevens, Wallace, Bailey, and Kennedy that he, the said Corbett, was at the Skagett Hotel and William Kennedy's place of business during the evening of the 12th of March, 1898, and the morning of the 13th day of March, 1898, until about three o'clock a. m. on said morning."

Counsel for the defendant offered to read from the affidavit of March Dickson, filed in support of this defendant's application for a continuance of the cause over the term, from the on the 23' line of said affidavit, beginning with the word "and," up to and including a
215 portion of the 18th line and to the on said line.

The portion of the affidavit offered by counsel was admitted in evidence without objection, and read to the jury as follows:

"And has known him ever since he was born; that of deponent's own knowledge and belief the sa'd defendant has always heretofore has borne a good reputation and character in the communit*ed* where he has lived; that during a very large portion of his life the said defen'ant has resided in the city of San Francisco, State of California; that he has been in the employ of the Pacific Coast Steamship Company as a fireman on board several different steamers, including the 'Queen' and the 'City of Puebla,' and that for three years last past he has been in the employ of the White Lumber Company, o' the steamer 'Whitesboro,' running between Mendicino County and San Francisco; that the general character and reputation of the sai' defendant has always been good as a peaceable, industrious, and law-abiding citizen, and that if an opportunity is offered the defendant by a continuance of this cause until such time as his witnesse' can be procured upon the trial the defendant will be able to

prove his said good character and reputation by the following witnesses: James Madison, secretary of the Pacific Coast Marine Firemen's Union, who resides at San Francisco, California; Edward Lanigan, formerly assistant collector of internal revenue at San Francisco, California; James Phelan, mayor of San Francisco, California; George Warren, an employe of the White Lumber Company and an expert lumber tallier, of San Francisco, California; John Cardinal, engineer for the Pacific Union Club, San Francisco, California, and Judge Troutt, one of the superior judges of San Francisco, California, all of whom are acquainted with the defendant's reputation and character in the city of San Francisco, where he has resided for many years past *past*."

216 Counsel for the defendant having no further evidence to offer on behalf of the defendant, rested his case.

Whereupon counsel for the prosecution offered the following evidence in rebuttal.

J. W. SNOOK, called on behalf of the prosecution in rebuttal, having been first duly sworn, testified as follows:

Examined by B. E. BENNETT:

Q. What is your name?
A. J. W. Snook.
Q. What is your business?
A. Deputy marshal at Dyea.
Q. Do you reside at Dyea, Alaska?
A. Yes, sir.
Q. Are you acquainted with John Fitzpatrick, the defendant here?
A. Yes, sir.
Q. Did you know him when in Dyea?
A. I did.
Q. How long have you been acquainted with him?
A. Since about the 15th of January.
Q. Do you know his reputation in the community in which he lives there?
A. Yes, sir.
Q. What is that reputation—good or bad?

217 (Counsel for the defendant objected to the above *above* question as improper and incompetent, and not proper rebuttal.)

By the COURT. Yes, I think the evidence on the part of the defense was not as to his reputation for truth and veracity, but as to his good moral character and reputation generally; the objection is sustained as the question stands.

By Mr. BENNETT. I will confine his reputation to his good moral character.

By the COURT. Ask the witness if he knows what that is.

A. I don't hardly know what that is.

Q. (By the COURT.) Good citizenship generally.

A. Well, among the citizens there it wasn't very good.

Q. (By the COURT.) What is generally said of him by the people in that community; if you know what the people generally say of him concerning his standing, answer the question, yes or no.

A. I know what is generally said of him.

Q. What is that—good or bad?

A. It is not very good.
Q. Do you know whether or not he went by any other name there?
A. Yes; he went by other names there.
Q. What names?
A. He is called Kelly, Hobo Kelly, and Fitzpatrick.

Cross-examination by Judge DELANEY:

Q. How long have you known him?
218 A. Since January 15th, last.
Q. That is all?
A. Yes, sir.
Q. You never knew him before?
A. No, sir.
Q. You are a deputy marshal, interested in his conviction?
A. I guess I am.

By Judge DELANEY. Stand aside.

Captain J. M. T. YOUNG, called on behalf of the prosecution in rebuttal, being first duly sworn, testified as follows:

Examined by Mr. BENNETT:

Q. What is your name?
A. J. M. T. Young, captain, United States Marine Corps.
Q. You reside here in Sitka, Alaska?
A. Temporarily; yes, sir.
Q. Are you acquainted with the use of firearms—guns, and so forth?
A. I am.
Q. Have you ever observed their appearance as to light when fired in the nighttime?
(Counsel for the defendant objected to the above question as not proper rebuttal testimony for the reason that it is a part of the Government's original case. Objection overruled by the court, to which ruling
219 counsel for the defendant then and there duly excepted.)
A. I have of shotguns and cannon.
Q. What is that?
(Counsel for the defendant objected to the above question upon the grounds that the witness is not testifying as to the arm in question in this case and on the further ground that the evidence is not proper rebuttal.)
By the COURT. I shall sustain the objection.
Q. Have you ever observed it with a revolver?
A. I never have. I never saw a revolver fired after night.

Doctor S. S. WHITE, called on behalf of the prosecution in rebuttal, being first duly sworn, testified as follows:

Examined by Mr. BENNETT:

Q. What is your name?
A. Stephen S. White, passed assistant surgeon, United States Navy.
Q. You reside here in Sitka now?
A. Yes, sir.
Q. On account of your connection with the Navy have you observed the effect of light from revolvers and guns when fired in the nighttime, or in the dark?

A. Yes, sir.

Q. State what that effect is?

By the COURT. That is, limited as to revolvers.

220 By Mr. BENNETT. Yes, sir.

A. Light up the space around the man firing the gun.

Q. If, on a dark night, a person firing a gun at that end of the room and a person standing at the other end of the room, could he see the person who did the firing?

(Counsel for the defendant objected to the above question as not proper rebuttal evidence. Objection overruled by the court, to which ruling counsel for the defendant then and there duly excepted.)

A. Providing he was facing the man he could.

Q. Do I understand, Doctor, that in these flashes that come from firing a gun in the nighttime more than one ray of light is produced?

A. There is a bundle of light or rays. It is not only one ray of light, but it is a collection of rays.

Q. Do you know what candlepower a pistol possess'?

A. Well, a .45-caliber revolver as is used in the Navy contains 35 grains of powder, a little more than three candlepower, instantaneous.

Q. (By a JUROR.) Are we to understand that is a revolver or shotgun?

By the COURT. A revolver.

Q. (By a JUROR.) That is, a .45 revolver?

A. Yes, sir; a three candlepower. The light follows the course of the bullet.

Cross-examination by Judge DELANEY:

Q. Instantaneous, you say?

221 A. Yes, sir.

Q. Doctor, I wish that you would briefly explain to the jury the mechanical process by which light conveys impressions to the brain.

A. Well, first the cornea is composed of seven layers of epitheleum, the anterior chamber of aqueous humor; the posterior chamber of the same; iris, commonly called pupil; crystaline lens; vitreous humor; then by striking the retina composed epithel rods and cones, through corpus leture, which is called the blind spot; thence to optic nerve; thence to optic tholimi; thence to opparent and origin of optic nerve, where the cells in the brain receive the impression of light, and is conducted back by the same source to the retina, where the photograph is made, and the individual becomes aware of an object transmitting the image.

Q. It is like a telegraph wire conveying the image to the brain?

A. No, sir; not at all; not like a telegraph wire at all.

Q. The image is conveyed to the brain——

A. No, sir.

Q. What is it?

A. An impression.

Q. You couldn't get an impression on the eye without light?

A. No, sir.

There being no further evidence to offer, the case was closed on both sides.

222 United States district court, district of Alaska.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN FITZPATRICK, DEFENDANT. } Affidavit.

UNITED STATES OF AMERICA,
District of Alaska, ss.

JOHN FITZPATRICK, being first duly sworn, deposes and says:

1. That he is the defendant named in the foregoing entitled action.

2. That at the May term of the United States district court for the district of Alaska he was indicted, tried, and convicted of the crime of murder, for which under the laws of said district the penalty of death may be inflicted.

3. That he is advised by his counsel, Arthur K. Delaney, who resides at Juneau, in the said district of Alaska, that the bill of exceptions in said case has been settled and allowed, and that all necessary steps on behalf of the defendant for the prosecution of an appeal or writ of error to the Supreme Court of the United States will be taken by said attorney, in behalf of this deponent, and perfected at the present November term of said district court, now in session at Juneau, Alaska.

4. That this deponent is without any means, moneys, prop-
223 erty, or resources wherewith to prosecute said appeal or writ of error to said Supreme Court or to pay the expenses of having the record and bill of exceptions printed as required by the rules of the said Supreme Court.

5. That the friends and relatives of this deponent are without means with which to aid deponent in the prosecution of the said appeal or writ of error, and that neither he nor they are able to raise money to fully defray the expenses incident thereto.

6. That deponent is advised by his said counsel and verily believes that he has good and just grounds for said appeal or writ of error, and that errors have been had upon the trial of said cause which materially affect the substantial rights of this deponent.

Wherefor deponent prays that said appeal or writ of error to the said Supreme Court of the United States may be prosecuted without deponent being required to pay the expense of having the record and bill of exceptions printed, according to the rules of the said Supreme Court.

JOHN FITZPATRICK.

Subscribed and sworn to before me this 19 day of Nov., 1898.

[SEAL.] CHAS. E. ALDEN,
Notary Public in and for the County of Marin, State of California.

(Endorsed:) No. 819. In the United States district court, district of Alaska, United States of America, plaintiff, vs. John Fitzpatrick, defendant. Affidavit filed Jan. 3rd, 1899, Albert D. Elliot, clerk. Arthur K. Delaney, attorney for defendant, Juneau, Alaska. Original.

224 United States district court, district of Alaska.

THE UNITED STATES OF AMERICA, PLAINTIFF, vs. JOHN FITZPATRICK, DEFENDANT. } At law. Petition for writ of error.

And now comes John Fitzpatrick, defendant herein, and says that on or about the 6th day of June, 1898, this court entered judgment in favor of the plaintiff and against this defendant, in which judgment, and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this defendant prays that a writ of error may issue in this behalf to the Supreme Court of the United States of America, for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

ARTHUR K. DELANEY,
Defendant's Attorney.

(Endorsed:) No. 819. In the United States district court, district of Alaska. United States of America, plaintiff, vs. John Fitzpatrick, defendant. Petition for writ of error filed January 3rd, 1899. Albert D. Elliot, clerk. Arthur K. Delaney, attorney for defendant, Juneau, Alaska. Original.

225 United States district court, district of Alaska.

UNITED STATES OF AMERICA, PLAINTIFF, vs. JOHN FITZPATRICK, DEFENDANT. } Order allowing writ of error.

Now, on this the 3rd day of January, 1899, comes the defendant, by his attorney, and files herein and presents to the court his petition praying for the allowance of a writ of error intended to be urged by him, and also files his assignment of errors in the premises and praying that a transcript of the record, and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be transmitted to the Supreme Court of the United States, and that such other and further proceedings as may be proper be had in the premises.

On consideration whereof, ordered that such writ of error be, and the same hereby is, allowed.

By the court:

CHARLES S. JOHNSON, *Judge.*

(Endorsed:) No. 819. In the United States district court, district of Alaska. United States of America, plaintiff, vs. John Fitzpatrick, defendant. Order allowing writ of error filed January 3rd, 1899. Albert D. Elliot, clerk. Arthur K. Delaney, attorney for defendant, Juneau, Alaska. Original.

226 United States district court, district of Alaska.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN FITZPATRICK, DEFENDANT. } Assignment of errors.

The defendant in this action in connection with his petition for a writ of error, makes this, his assignment of errors, which he alleges have occurred on the trial of this cause, as follows, to wit:

1. The court erred in overruling the defendant's demurrer to the indictment.

2. The court erred in denying the defendant's motion to quash the indictment.

3. The court erred in denying defendant's challenge to the array of the grand jury.

4. The court erred in setting the cause down for trial for the 26th day of May, 1898, on the application of the district attorney, and in opposition to defendant's objection.

5. The court erred by making a further order on the said 26th day of May, 1898, further continuing said cause until the arrival of the next mail steamer, and in any event not later than May 31st, 1898, at 10 o'clock a. m.

6. The court erred in denying the defendant's application for a continuance over the term.

7. The court erred in granting the application of the Brooks and Corbett for a separate trial.

8. The court erred in granting the district attorney's motion to first place defendant Fitzpatrick on trial.

227 9. The court erred in denying the defendant's challenge to the array of the petit jury.

10. The court erred in the rejection of evidence sought to be introduced by the defendant upon the trial in the following instances, to wit:

(a) In sustaining the objection of the Government counsel to the question, "Did you desert?" propounded to the Government witness, John Lewis Brook, upon cross-examination by the defendant, after said witness had testified that he was a sailor on board the U. S. S. "Concord."

11. The court erred in the admission of evidence offered by the plaintiff in the following instances, to wit:

(a) In the rulings made by the court upon the examination of one Philip Ballard, a witness in behalf of the Government, which rulings are as follows: Said witness after testifying to a certain conversation with a person, not the defendant Fitzpatrick, was asked the question, "Who was this man?" and said witness testified: "Well, I was told afterwards it was——." Whereupon counsel for defendant objected to witness stating what he was told, and without waiting for a ruling of the court, counsel for the Government asked the question, "Did you find out afterwards who it was?" To which question counsel for the defendant objected; objection was overruled, and counsel for the Government reasked the question, "Who did you find out afterwards this man was?" To which witness responded, "Well, they told me the man's name was Corbett." Whereupon counsel for defendant moved to strike out said testimony as

hearsay and motion was denied. The man Corbett was then, at the request of the district attorney, brought into the court room, and the witness was asked the following question: "Is that the man that applied to you?" To which witness answered, "I could not say that it was for
228 sure." Witness was then asked by the district attorney, "What is your best judgment?" To which the witness replied, "Well, I saw the man in the dark. It was in front of the cabin and there was only a candle light in the cabin. He came there about a minute; that is the first time I ever saw the man in my life; I couldn't say that it was the same man that was there or not." Counsel for Government then asked the witness, "Now state what is the best of your judgment." To which question counsel for defendant objected; objection was overruled, and the witness answered, "Well, I should say that it seems to resemble the man a little. He was standing in the court room and they called me up and they asked me if I could recognize him; I said no, I couldn't; he was standing with his arm done up; when I saw him he was a strong, healthy-looking man." Whereupon the witness was asked by the district attorney if he testified before the grand jury, and having testified in the affirmative, was asked by the district attorney the question, "What was your testimony there?" To which the witness answered, "I testified there was a man came; they asked me if it wasn't Corbett, and I told them it resembled him; they said, then you know it was Corbett, and I didn't tell them that I though' it was at all; they wanted to have me say that, they said it for me, so I let it go at that." Whereupon the court, addressing the witness, said, "Mr. Witness, answer that question—whether that is the man that applied to you that evening, whether it was or was not, to your best judgment." Defendant objected; objection was overruled, and witness answered, "Well, I should say it was, to my best judgment." Whereupon counsel for defendant moved to strike out all the testimony of the witness Ballard, which motion was denied.

(b) In admitting as evidence the testimony of the Government
229 witness, Dr. T. L. Price, who testified that William Corbett applied to him for medical assistance on the morning of the 13th day of March, 1898, at about three o'clock, and that Corbett was wounded in the right shoulder, and was under the witness' attendance three weeks or a month.

(c) In admitting in evidence the testimony of the witness in behalf of the Government, John Cudihee, who produced in court two pairs of shoes and testified that one was Corbett's and one Fitzpatrick's, which said shoes were thereupon offered in evidence and received, and afterwards in permitting said witness to testify that he had compared Corbett's shoes with certain footprints made about the cabin where the homicide occurred, and tha' said footprints corresponded with the size and make of the shoes claimed by witness to be Corbett's, and also in permitting said witness to testify as to the finding of certain tools in the cabin occupied by Fitzpatrick, for the purpose of showing that the same were burglars' tools.

(d) In permitting the following testimony to go to the jury upon the cross-examination of the defendant Fitzpatrick, whose whole testimony in chief is as follows: "I was up between Clancey's and Kennedy's on the night of the 12th of March, 1898, about half past twelve or one o'clock; about one o'clock, I guess, I went up to Kennedy's and had a few drinks

with Captain Wallace and Billy Kennedy, and I told them I was getting kind of full and I was going home; and along about a quarter past one Wallace brought me down as far as Clancey's and then took me down to the cabin and *and* left me in the cabin, and we wound the alarm clock and set it to go off at six o'clock, and I took off my shoes and laid down on the bunk and woke up at six o'clock in the morning and went up the street." Witness also testified that the men, Kennedy and Wallace, referred to are the witnesses mentioned in defendant's affidavit for
230 a continuance, as testified by Corbett and Brooks.

The foregoing being all the testimony of the said witness in his examination in chief, the court erred in permitting said witness to testify upon cross-examination and admitting under such examination the following evidence: Anything concerning who roomed with the witness in the cabin; whether the defendant wore boots or shoes that night; whether he wore that night the same suit of clothes he had on in court; what kind of a suit he did have on; whether he wore that night the same hat he then had in court; whether he had a fur cap also; whether at the time of the homicide the witness had a mackinaw suit with a large belt and buckle; what business the witness 'as engaged in for Wilson and Kennedy; what sort of clothes he had been wearing a week or two previous to the homicide; whether or not he had a pair of rubber boots; how long he had known William Corbett; whether or not Corbett had a pair of shoes with nails in the bottom of them; when he first saw Corbett on the 13th of March, 1898; whether he saw him on the evening of the twelfth of March, 1898; whether he remembered what kind of shoes he had on that evening; whether anybody else was in the cabin with defendant besides Brooks and Corbett; all of which testimony was admitted under defendant's objection.

(c) That the court erred in admitting in *evidence* as *as* rebuttal the testimony of J. M. T. Young as to his observati'ns concerning light produced by the flash of a firearm in the night time, and also erred in admitting as rebuttal the testimony of Dr. S. S. White concerning the same subject.

12. In making his charge to the jury the court erred in refusing to give instructions to the jury as requested by the defendant in the following instances:

231 (a) Instruction No. 1 requested by defendant, "In this case the defendants are jointly indicted, and in order to sustain a conviction it is necessary for the Government to establish a common design or intent or purpose by two or more of the defendants to commit murder or some other felony, or that they were actually engaged in such attempt, and this constitutes or is the essence of the charge of a conspiracy, and this common design or actual participation must be proved in order to warrant a conviction either by direct evidence, o or by proof of such circumstances as naturally tend to prove it, and sufficient in themselves to satisfy the jury of the existence of such common design or actual participation beyond a reasonable doubt."

(b) In refusing to give to the jury the following instructions asked by defendant, and numbered 7: "You are also further instructed that in all criminal trials where the prosecution depends upon circumstantial evidence which is not conclusive in its character, previous good character on

the part of the defendant, if proved, is entitled to great weight in favor of innocence, and where there is a serious conflict in the testimony as to the commission of any offence like that charged in this case, evidence of the previous good character of the defendant should be considered by the jury in connection with all other evidence given on the trial in determining whether the defendant would be likely to commit or did commit the offence in question; that in doubtful cases evidence of good character is conclusive in favor of the party accused, and if you find from the evidence that the facts and circumstances proved and relied upon to establish defendant's guilt are in doubt, or that the intention of the defendant to commit the crime is in doubt, then, if the prisoner has by evidence satisfied you that he was a man of good character up to the time of the alleged offence in this case, the presumption of law is
232 that the alleged crime is so inconsistent with the former life and character of the defendant that he could have intended to commit such a crime, and it would be your duty to give the defendant the benefit of that presumption and acquit him."

13. The court erred in using the following language in his charge to the jury, such language being given as an addition to or a modification of instruction No. 1, requested by the defendant, such language being as follows: "Unless you shall find, beyond a reasonable doubt, that the defendant wantonly shot and killed the deceased without excuse or justification."

The court also erred in using the following language in his charge to the jury: "But if you shall fail to find the defendant guilty of murder, either with or without the above qualifications, you may, under the law of this district, find him guilty of manslaughter, if the evidence so warrants. Manslaughter is the unlawful killing of a human being by another human being, without excuse or justification, but without malice express or implied. The Revised Statutes of the United States, which is the law of this district applicable to this case, defines manslaughter as follows: Every person who unlawfully and wilfully, and without malice, strikes, stabs, wounds, or shoots at or otherwise injures another, of which strikin', stabbing, wounding, shooting, or other injury such other person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter. So, in this case, if you find from all the evidence, beyond a reasonable doubt, that the defendant, at the time and place in the indictment charged, unlawfully and wilfully, but *but* without malice, express or implied, under the law, as I have heretofore given it to you on that subject, shot and killed the deceased, then the crime is manslaughter."

233 14. The court erred in overruling the defendant's motion for a new trial.

15. The court erred in denying the defendant's motion for an arrest of judgment.

16. The court erred in rendering and entering judgment in favor of the plaintiff and against the defendant and in passing sentence thereupon.

ARTHUR K. DELANEY,
Defendant's Attorney.

(Endorsed:) No. 819. In the United States district court, district of Alaska. United States of America, plaintiff, vs. John Fitzpatrick, defendant. Assignment of errors. Filed Jan. 3rd, 1899. Albert D. Elliot, clerk. Arthur K. Delaney, attorney for defendant. Juneau, Alaska. Original.

234 United States district court, district of Alaska.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN FITZPATRICK, DEFENDANT. } Writ of error.

THE UNITED STATES OF AMERICA,
District of Alaska, ss:

The President of the United States to the honorable judge of the district court of the United States for the district of Alaska, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said district court before you, between the United States of America, plaintiff, and John Fitzpatrick, defendant, a manifest error hath happened, to the great damage of the said John Fitzpatrick, defendant, as by his complaint appears, and we being willing that error, if any hath been, should be fully corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, District of Columbia, on the 2nd day of February next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to
235 be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

CHARLES S. JOHNSON,
U. S. District Judge.

Witness the honorable Charles S. Johnson, judge of the district court of the United States for the district of Alaska, this the 3rd day of January, 1899, and in the hundred and twenty-third year of the Independence of the United States of America.

Attest:

[SEAL.] ALBERT D. ELLIOT, *Clerk.*

(Endorsed:) No. 819. In the United States district court, district of Alaska. The United States of America, plaintiff, vs. John Fitzpatrick, defendant. Writ of error. Filed Jan. 3rd, 1899. Albert D. Elliot, clerk. Arthur K. Delaney, attorney for defendant. Juneau, Alaska. Original.

236 United States district court, district of Alaska.

THE UNITED STATES OF AMERICA, PLAINTIFF, vs. JOHN FITZPATRICK, DEFENDANT. } Citation.

THE UNITED STATES OF AMERICA,
District of Alaska, ss.

To the United States of America, the above-named plaintiff, greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington in the District of Columbia, on the 2nd day of February next, pursuant to a writ of error filed in the clerk's office for the United States district court for the district of Alaska, wherein United States is plaintiff, and John Fitzpatrick is defendant, the said Fitzpatrick being plaintiff in error herein, and the said United States defendant in error herein, to show cause, if any there be, why the judgment rendered against the said Fitzpatrick, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Charles S. Johnson, judge of the district court of the United States for the district of Alaska, this 3rd day of January, 1899, and in the hundred and twenty-third year of the independence of the United States of America.

CHARLES S. JOHNSON,
U. S. District Judge.

237 Due personal service of this citation, together with the petition for a writ of error, the assignment of errors, the order allowing the writ of error, the writ of error, is hereby admitted and accepted on behalf of the United States, the defendant in error, this 3rd day of January, 1899.

ROBERT A. FRIEDRICH,
U. S. District Attorney.

(Endorsed:) No. 819. In the United States district court, district of Alaska, The United States of America, plaintiff, vs. John Fitzpatrick, defendant. Citation, filed January 3rd, 1899; Albert D. Elliot, clerk; Arthur K. Delaney, attorney for defendant. Original.

238 UNITED STATES, *District of Alaska, ss.:*

I, Albert D. Elliot, clerk of the district court of the United States of America for the district of Alaska, do hereby certify that the foregoing pages, numbered from one to 238 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of the United States of America vs. John Fitzpatrick, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of said court to be hereunto affixed at the town of Sitka, in said district, the 21 day of January, A. D. 1899.

[SEAL.]

ALBERT D. ELLIOT, *Clerk.*

239 UNITED STATES OF AMERICA, ss.

The President of the United States to the honorable the judge of the district court of the United States for the district of Alaska, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court before you, or some of you, between the United States of America, plaintiff, and John Fitzpatrick, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the third day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.] ALBERT D. ELLIOT,
Clerk of the District Court of the United States for the District of Alaska.

Allowed by

CHARLES S. JOHNSON,
U. S. District Judge, District of Alaska.

(Indorsed:) Filed Jan. 3rd, 1899. Albert D. Elliot, clerk.

240 United States district court, district of Alaska.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN FITZPATRICK, DEFENDANT. } Citation.

THE UNITED STATES OF AMERICA,
District of Alaska, ss.

To the United States of America, the above-named plaintiff, greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, in the District of Columbia, on the 2nd day of February next, pursuant to a writ of error filed in the clerk's office for the United States district court for the district of Alaska, wherein United States is plaintiff, and John Fitzpatrick is defendant. The said Fitzpatrick being plaintiff in error herein and the said United States defendant in error herein, to show cause, if any there be, why the judgment rendered against the said Fitzpatrick as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Charles S. Johnson, judge of the district court of the United States for the district of Alaska, this 3rd day of January, 1899, and the hundred and twenty-third year of the Independence of the United States of America.

CHARLES S. JOHNSON,
U. S. District Judge.

241 Due personal service of this citation, together with the petition for a writ of error, the assignment of errors, the order allowing the writ of error, the writ of error, is hereby admitted and accepted on behalf of the United States, the defendant in error, this 3rd day of January, 1899.

ROBT. A. FRIEDRICH,
U. S. District Attorney.

(Endorsed:) No. 819. In the United States district court, district of Alaska. The United States of America, plaintiff, vs. John Fitzpatrick, defendant. Citation, filed January 3rd, 1899. Albert D. Elliot, clerk. Arthur K. Delaney, attorney for defendant. Original.

242 (Indorsed:) No. 819. In the United States district court, district of Alaska. United States of America, plaintiff, vs. John Fitzpatrick, defendant. Citation, filed Jan. 3, 1899. Albert D. Elliot, clerk. Arthur K. Delaney, attorney for defendant, Juneau, Alaska. Original.

Due service of a copy of the within is admitted this day 189 .

Attorney for

243 (Indorsement on cover:) File No. 17,613. Alaska D. C. U. S. Term No. 499. John Fitzpatrick, plaintiff in error, vs. The United States. Filed January 18", 1900. Office Supreme Court U. S. Received Feb. 2, 1899.

FILED
JAN 19 1900
JAMES H. McKENNEY,
Clerk.

No. 499.

Motion to advance.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Jan. 19, 1900.

JOHN FITZPATRICK, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA.

MOTION TO ADVANCE.

Plaintiff in error was indicted, tried, and convicted in the court aforesaid for the crime of murder, the verdict being "without capital punishment," and resulting judgment directing imprisonment for life in the penitentiary at San Quentin, California, where he has since been and is now confined. Writ of error has been allowed to this court to review such judgment.

Wherefore it is respectfully moved that the cause be now advanced and assigned for argument at such early date in the present term as this honorable court may deem proper.

JULIUS KAHN,
Attorney for Plaintiff in Error.

FILED
APR 17 1900
JAMES H. MCKENNEY,
Clerk.

No. 499.

Brf. of Browne, Kahn & Britton for P. E.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1899.

Filed April 17, 1900.

JOHN FITZPATRICK,
PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

No. 499.

In Error to the District Court of the United States for the District of Alaska.

BRIEF FOR PLAINTIFF IN ERROR.

A. B. BROWNE,
JULIUS KAHN,
ALEX. BRITTON,
Attorneys for Plaintiff in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

JOHN FITZPATRICK,
PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

No. 499.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

At the May Term, 1898, of the Court below, plaintiff in error was jointly indicted with Henry Brooks and William Corbett for the crime of murder. They were arraigned and severally demurred to the indictment (R. 5). Such demurrer was overruled and exception taken (R. 6), whereupon each defendant plead not guilty. Motions for continuance being made and denied (R. 15), Brooks and Corbett moved and obtained order for separate trials (R. 17), whereupon the United States Attorney moved, and the Court directed the trial of Fitzpatrick to then proceed, to be followed by the trial of Corbett (R. 17).

Upon trial of plaintiff in error, verdict of "guilty without "capital punishment" was rendered (R. 24). Motions for new trial and in arrest of judgment were entered, heard and overruled (R. 32, 33), and judgment thereupon entered (R. 32), sentencing him to imprisonment at hard labor at San Quentin, California, where he is now confined. To review such judgment this writ is prosecuted *in forma pauperis.*

Assignment of Errors.

These appear at large in the transcript (R. 105, 108). Thereon we submit.

ARGUMENT.

1.

Indictment Insufficient.

Defendant's demurrer thereto alleged (*inter alia*):

"That said indictment does not substantially conform "to the requirements of Chapter 8 of the Oregon Code of "Criminal Procedure applicable to this indictment."

This indictment is brought under Section 5339, U. S. Revised Statutes. That section does not define the crime of murder, but prescribes its punishment.

By Section 7 of the act approved May 17, 1884, "An "act providing a civil government for Alaska" (23 Stats. 24), it is provided—

"That the general laws of the State of Oregon, now in "force, are hereby declared to be the law in said district, "so far as the same may be applicable, and not in con-

" dict with the provisions of this act, or the laws of the " United States. * * * "

The sufficiency of this indictment must, therefore, be determined by the law of Oregon and the decisions of the highest Court of that State rendered thereon, as existing at the date of its adoption in Alaska, May 17, 1884, for it is well settled that the adoption of a statute in such form carries with it its settled judicial interpretation in the jurisdiction of its origin.

This has been directly ruled in *United States* v. *Clark* (46 Fed. Rep. 633), involving an indictment for murder in Alaska. Therein the Court ruled (syllabus):

" Revised Statutes U. S., Sec. 5339, providing for the " punishment of the crime of murder, having made no " provision as to the form of procedure, resort must be " had, in testing the sufficiency of an indictment for a " murder committed in Alaska, to the laws of Oregon in " force May 17, 1884, rather than to the rules of the " common law."

The Criminal Code of Oregon (1870, par. 1269) gives the statutory form of indictment for crimes. In the appendix thereto, the gravamen of an indictment for murder is stated thus:

" Purposely and of deliberate and premeditated malice, " killed C. D. by (shooting him with a gun or pistol, or " by administering to him poison, etc.) "

By Section 71 of the Oregon Criminal Code, it is provided that—

" The manner of stating the act constituting the crime, " as set forth in the appendix to this code, is sufficient in " all cases when the forms there given are applicable."

The indictment of Fitzpatrick, here involved (R. 1), *does not* conform to settled statutory requirement of the Oregon law. It wholly fails to aver, as a direct charge, the act of killing, as the statutory form of Oregon requires. Deliberate and premeditated malice is averred in assaulting the deceased, and likewise in discharging against him a loaded revolver, but there is no such charge of deliberate and premeditated malice in killing. This is an essential requirement in all jurisdictions where murder is made matter of statutory definition when the indictment therefor must, with exact precision, charge premeditated intent to kill, precisely as defined by the Oregon law.

The case at bar is hence fully within the general rule on this head, well stated in the Encyclopædia of Pleading and Practice, Vol. 10, Title, Homicide, p. 116, as follows:

> "It is almost universally the rule that in an indictment "for murder the purpose to kill must be specifically "averred as a part of the description of the offence. "Such purpose is an essential element of the statutory "crime, although not essential at common law"—

citing many authorities. *Inter alia*, *State* v. *Brown*, 21 Kan. 38, wherein it was held that where an indictment for murder charged that the defendant deliberately and premeditatedly committed an assault and battery upon the deceased by shooting him with a pistol loaded with gunpowder and leaden balls, and inflicted a mortal wound, from which mortal wound the deceased died, but did not anywhere charge that the defendant committed the assault and battery or did the shooting or killing with the deliberate and premeditated intention of killing the deceased, it was held that such indictment did not charge murder in the first degree.

So in *Schaffer* v. *State*, 22 Neb. 557, it was held that an averment that the accused "feloniously, purposely, "and of his deliberate and premeditated malice" did make an assault upon the deceased, and that he "did then "and there feloniously, purposely, and of his deliberate "malice," shoot the deceased with a gun loaded, etc., inflicting a mortal wound of which the deceased then and there died, does not satisfy the requirements of the law; for though the accused may have purposely and of deliberate and premeditated malice assaulted the deceased, and shot him, it does not follow that the shooting was with the design and purpose to produce death.

In *Wharton on Criminal Pleading and Practice*, Sec. 1063 (Sec. 1), the rule is stated thus:

"When the intent is to be proved, in order to indicate "the character of the act, as when there is an attempt or "assault, to commit an offence, in such cases the intent "must be averred *and must be attached to all the material* "*allegations.*"

In United States *v.* Clark, *supra*, this was done. The indictment there involved is set out in the report of the case, and distinctly charges that defendant "of deliberate "and premeditated malice killed" the deceased "by then "and there shooting him in the body with a double-"barrelled shot-gun."

That indictment was sustained by the Court because sufficient in form and substance under the Oregon Code. Comparison of the form of indictment in the case thus cited with that involved in the case at bar will clearly show the full sufficiency of the former and the fatal weakness of the latter in this regard.

In *Leonard* v. *Territory* (2 Washington Ty. 381) it was held (syllabus):

" An indictment is not sufficient to sustain a sentence " of murder in the first degree which charges the assault " and shooting to have been done purposely and of " deliberate and premeditated malice, but does not aver " the killing *itself* to have been done purposely and of " deliberate and premeditated malice, and only charges " manslaughter. The conclusion, 'And so the jurors do " 'say the said Andrew Leonard * * * feloniously, " 'purposely, and of deliberate and premeditated malice " ' * * * did kill and murder,' does not supply this " essential averment. The latter statement is but an " inference of the grand jury from their former statement, " which its language will not admit of" (the precise averment in the indictment at bar.)

In the case last cited the Court's decision observes :

" Our statute requires that to constitute such a murder " in the first degree as would consist, with the facts " charged in this indictment, the killing must have been " done purposely and of deliberate and premeditated " malice. Five or six States have statutes similar to, and " three or four others statutes almost identical, with our " own. So far as we are advised, the Supreme Courts of " all those States concur in holding that to bring a case " within the statute, the indictment must charge that the " killing itself was purposed and deliberate and premeditated malice. Oregon Criminal Code, Sec. 506 ; 7 Ore. " 198 ; 8 Ohio St. 109, 307 ; 10 Ohio St. 495 ; 54 Ind. " 135 ; 59 Ind. 105 ; Iowa Code, Sec. 4192 ; 4 Greene, " 500 ; 27 Iowa, 402 ; 24 Penn. St. 286 ; 83 Penn. St. " 131 ; 5 Mo. 379 ; 20 Mo. 58 ; 25 Mo. 326 ; 6 Mo. 24 ; " 8 Yerger, 534 ; 49 N. H. 369."

The Criminal Code of Oregon here applicable, provides that :

" If any person shall purposely and of deliberate malice " kill another, such person shall be deemed guilty of " murder in the first degree."

In *Wharton, supra*, Par. 163A, the rule is clearly stated that where intent is part of the statutory definition of the offence, it must be so averred.

In *Hagen* v. *State* (10 Ohio St. 459), it was held :

" Intent or purpose to kill is essential to constitute the " crime of murder in the first or second degree, as de- " fined by the statutes of Ohio ; and this intent must be " specifically and directly averred as part of the description " of the offence in every indictment for either of these " crimes. An averment that the accused ' purposely and " ' of deliberate and premeditated malice did strike ' the " deceased, thereby inflicting a mortal wound, of which " the deceased afterwards died, does not satisfy the re- " quirements of the law ; for, although the accused may " have purposely and maliciously struck the deceased, it " does not follow that the stroke was given with a design " to produce death."

This ruling has exact application to the case at bar, for the form of language used in the indictment there involved and held insufficient, is the exact form found in the indictment here under review.

In *State* v. *McCormick* (27 Iowa, 402), the Court, speaking by Chief Justice Dillon, said :

" The killing then, to make murder in the first degree " (and the kind of killing which was relied on below) " is one which is wilful, deliberate and premeditated " * * * ; The indictment does indeed charge that the " assault was wilful, deliberate, and premeditated ; that " the blow was dealt purposely with premeditation ; but " it does not charge that it was thus dealt for the purpose " or with the intent to kill, or that the killing, the taking " of the life of the deceased was wilful, deliberate, and " premeditated. It needs no argument to show that an " assault may be wilful, deliberate, and premeditated " without there being any intent whatever on the part of " the assailant to kill or take the life of the person

" assaulted. And it is just here that the indictment con-
" sidered as one charging murder in the first degree is
" defective. This appears from the statute which is that
" 'the killing,' and not simply the assault, must be wilful,
" deliberate, and premeditated, in order to constitute
" murder in the first degree."

In *Commonwealth* v. *Boynton* (12 Cush. 499), it was held:

"It is a familiar rule of criminal pleading that wherever
" the intention of the party is necessary to constitute an
" offence, such intention must be alleged in every material
" part of the description when it so constitutes it."

In *State* v. *Young* (55 Kansas, 349), it was held:

" In Ohio they have a statute similar to ours, which
" provides that 'if any person shall, purposely and malic-
" 'iously, but without deliberation and premeditation,
" 'kill another, every such person shall be guilty of
" 'murder in the second degree, and on conviction thereof
" 'shall be imprisoned in the penitentiary and kept at
" 'hard labor during life.' In interpreting their statute,
" the Supreme Court of that State held that the intent or
" purpose to kill, although not essential to constitute
" murder at common law, was made one of the ingredients
" of the crime of murder by the statute of Ohio, and that
" to convict of murder in the second degree the State
" must allege and prove a purpose or intent to kill.
" Fouts *v.* State, 8 Ohio St. 98; Robbins *v.* State, *ib.*
" 131; Jones *v.* State (Ohio), 38 N. E. 79.

" We think this the correct view of the statute, and
" the manner in which homicides are graduated by the
" Statute, tends to confirm the interpretation * * *
" This qualification clearly makes the purpose to kill an
" essential ingredient of murder in the second degree."

And under similar statutory provisions, like rule is declared in—

Jewell v. *Territory* (*Okla.*), 43 Pac. 1,075;
Holt v. *Territory* (*Okla.*), 43 Pac. 1,083;
Wright v. *Territory* (*Okla.*), 47 Pac. 1,069;
Stover v. *Territory* (*Okla.*), 49 Pac. 1,009.

In examining this question we must necessarily resort to the State statutes and State authorities based thereon. There are no common law offences against the United States, and the adoption of the laws of Oregon in this regard in the District of Alaska, necessarily brings into review the law of that State, and similar laws of other States, relating to the same subject, as well as their judicial interpretation. The foregoing authorities are culled from many to like effect. Cumulative citation is unnecessary, because unduly extending this brief.

The Federal cases stand in entire harmony with foregoing State authorities on this head. Thus, in *Evans* v. *United States* (153 U. S. 584, 593), it was said:

"Where, however, the statute uses words which are "not absolutely inconsistent with an honest purpose, such "as was held by this Court in Britton's case (108 U. S. "193), were the words 'wilfully misapplied,' *the allegation "of an intent to defraud becomes material in the highest "degree.* In fact, the gravamen of the offence consists "in the evil design with which the misapplication is made, "and a count which should omit the words 'wilfully,' "etc., and '*with intent* to defraud' *would be clearly "bad.* * * * "

"*Where the intent is a material ingredient of the crime "it is necessary to be averred;* but it may always be "averred in general terms, as in a case of assault with "intent to kill. So in an indictment for murder, it is "necessary to aver that the killing was done wilfully, "feloniously, and of malice aforethought." * * *

" This subject, however, was so fully considered by this " Court in United States *v.* Simmons, 96 U. S. 360, 364, " that it is needless to dwell upon it more at length here."

In *United States* v. *Cruikshank et al.* (92 U. S. 542, 557), the Court said :

"In criminal cases, prosecuted under the laws of the " United States, the accused has the constitutional right " ' to be informed of the nature and cause of the accusa- " ' tion.' Amend. VI. In United States *v.* Mills, 7 Pet. " 142, this was construed to mean that the indictment " must set forth the offence 'with clearness and all neces- " ' sary certainty, to apprise the accused of the crime with " ' which he stands charged'; and in United States *v.* Cook, " 17 Wall. 174, that 'every ingredient of which the offence " ' is composed must be accurately and clearly alleged.' " It is an elementary principle of criminal pleading, that " where the definition of an offence, whether it be at com- " mon law or by statute, 'includes generic terms, it is not " ' sufficient that the indictment shall charge the offence " ' in the same generic terms as in the definition, but it " ' must state the species—it must descend to particulars.' " 1 Arch. Cr. Pr. and Pl. 291. The object of the indict- " ment is, first, to furnish the accused with such a descrip- " tion of the charge against him as will enable him to " make his defence, and avail himself of his conviction or " acquittal for protection against a further prosecution " for the same cause, and, second, to inform the Court of " the facts alleged, so that it may decide whether they are " sufficient in law to support a conviction, if one should " be had. For this, facts are to be stated, not conclu- " sions of law alone. *A crime is made up of acts and in- " tent, and these must be set forth in the indictment* with " reasonable particularity of time, place, and circum- " stances."

These authorities stand in entire harmony with the State cases cited, *supra*. Tested by them all, it is manifest that the indictment in the case at bar is fatally defective in

failing to charge the crime of killing *eo nomine*, or as done with deliberate malice. The defendant was called to plead to the charge of assaulting and shooting, but the indictment wholly fails to charge premeditated intent to *kill*, and is hence fatally defective.

II.

ERROR IN ADMITTING IN EVIDENCE ACTS AND DECLARATIONS OF CO-DEFENDANT CORBETT, NOT OCCURRING IN THE PRESENCE OF FITZPATRICK.

In the charge to the jury the Court (*inter alia*) said (R. 22):

"It is the theory of the prosecution that the defendants, "John Fitzpatrick, and Henry Brooks, and William Cor- "bett, were jointly engaged in an unlawful attempt to rob "the deceased, Samuel Roberts. If you find from the "evidence, beyond a reasonable doubt, that the defend- "ant, John Fitzpatrick, and the said Brooks and Cor- "bett, had conspired to rob the deceased, and were actu- "ally engaged in the attempt to commit such robbery, "and you shall further find that in attempting to carry "out such unlawful object, any one of the defendants "shot and killed the deceased, then the defendant, John "Fitzpatrick, is guilty. If any two or more persons con- "spire to do an unlawful act, and death happens in the "prosecution of the common object, all are alike guilty "of homicide."

The indictment does not charge an attempt or conspiracy to commit robbery, with killing of the deceased as the result thereof. No mention is made therein of a conspiracy to rob Roberts.

The only witness produced by the Government, who was present when the deceased met his death, was one

Ross, whose testimony appears in the Record (pp. 45–55). On direct examination (pp. 45–46) he gives his narrative of the events which occurred thereat.

Thereafter the Government introduced one Philip Ballard (R. 66), a soldier on guard duty at Dyea, on the night of the occurrence, who testified that about two o'clock on the morning of March 13, he heard four or five pistol shots in a southerly direction, and from where, he has since learned, the location of Roberts' cabin and the Wonder saloon to be, and that some fifteen or twenty minutes, or half an hour thereafter "a man came to me; "I was in the cabin and he rapped at the door, and I "went to open the door for him, and he said he would "like to get a doctor; he was shot." * * * "I "directed him to the hospital in town and he went that "way."

Over the objection of defendant's counsel, this witness was asked and answered that he did not know the man, but was afterwards told that his name was Corbett. Corbett was brought into Court, but witness could not identify him with certainty. All of this testimony, with respect to such identification, was objected to, and is set forth at length in the bill of exceptions, which then recites (R. 37):

"Whereupon counsel for the defendant moved to "strike out all of the testimony of the witness Ballard, on "the ground that it does not contribute in any manner "to the identification or guilt of Fitzpatrick then on "trial, which motion was overruled and exception taken "by the defendant and allowed."

The Government also summoned one Doctor T. L. Price, who testified (R. 69) that about three o'clock on the morning of March 13, 1898, William Corbett applied to him for medical assistance; that Corbett was wounded

in the right shoulder and witness was in attendance upon him three weeks or a month. Thereupon defendant's counsel moved to strike out all of this testimony of witness Price "on the ground that it does not affect the de- "fendant on trial." The motion was denied and exception taken. This objection is also fully preserved in the bill of exceptions. (R. 37.)

The Government also introduced the testimony of John Cudihee, U. S. Deputy Marshal of Dyea, who produced in court two pairs of shoes, testifying that one pair was Corbett's and one pair Fitzpatrick's. To this testimony, defendant's counsel objected, because the articles had not been sufficiently identified, and on the further ground "that any testimony relating to Corbett was improper and "irrelevant on the trial of this defendant. * * *", This objection was overruled and exception taken. (R. 38.)

Over the objection of the defendant's counsel, this witness was further allowed to testify that he took Corbett's shoe and fitted it into the impression in the sand around the Roberts' cabin, where the shooting occurred. Again defendant's counsel objected and moved to strike out all the testimony of this witness in reference to Corbett's shoes "on the ground that it cannot affect the guilt or "innocence of the defendant now on trial, which motion "was denied and exception taken by defendant and "allowed." (R. 38.)

These matters are grouped for convenience of argument. Thereon we submit—

It was manifest error to admit *any* testimony relating to the acts of Corbett and especially those which occurred after the alleged crime had been committed. No direct testimony appears in the record showing the presence of Corbett at the cabin before, during, or after commission

of the crime for which defendant Fitzpatrick was then on trial. Upon the theory of a conspiracy indulged by the Government, as expressed in the Court's charge *supra*, Fitzpatrick manifestly could not be affected upon the issue of his guilt or innocence, by testimony relating to Corbett affecting his acts, done without Fitzpatrick's presence, and especially after the commission of the alleged offence. *Corbett was not then on trial;* was not offered as a witness by the Government, nor brought by the entire testimony of record in this cause into any direct relation with Fitzpatrick, in connection with the crime for which the latter was then on trial. All the testimony relating to Corbett and to his acts or declarations, was hence inadmissible and the proper subject of exceptions. Whether exclusion thereof from the case would or would not have so affected the jury as to have produced a different verdict, is not material. If the evidence was improperly admitted, it went to the jury as part of the Government's case, and its admission by the Court was sufficient to justify the full belief by the jury that such testimony was material as bearing on the guilt or innocence of Fitzpatrick. If the defendants had been tried jointly, some of the evidence now objected to might have then been admissible, in so far as same did not concern acts and declarations of Corbett, made without the presence of his co-defendant, for the jury could have found one guilty and acquitted the other. When the Court permitted severance, and compelled Fitzpatrick to go to trial, none of the evidence objected to with respect to Corbett was admissible against him.

The manifest purpose of the testimony of Ballard, as offered, was to show that shortly after he heard four or five pistol shots come from the direction of the Roberts' cabin, a man, then unknown to him, rapped at his cabin

door and told him "he would like to get a doctor, he was "shot."

Whilst this was not an admission by Corbett of the circumstances under which he had been shot, the connection in which the testimony was used by the Government was so intended, and did, in legal effect, operate upon the jury as connecting Corbett and Fitzpatrick with the crime for which defendant Fitzpatrick was then alone upon trial. It is the *use* thus made of Corbett's act or declaration which properly made the statement of the witness inadmissible against Fitzpatrick.

Viewed in this necessary light, we submit the testimony of the witness Ballard was inadmissible against Fitzpatrick, upon clear analogy to the principle announced in *Sparf and Hansen* v. *United States* (156 U. S. 51). In that case declarations of Hansen connecting Sparf with the homicide there involved tending to prove the guilt of both, and made in the absence of Sparf, were held inadmissible against the latter. *It happened* that both defendants were jointly under trial in that case, but the Court observes (p. 58), "If Sparf had been tried alone a "general objection in his behalf, on the ground of incom- "petency, would have been sufficiently definite."

The principle thus affirmed has clear application to the case at bar, for, while in the case cited, the declarations of a co-defendant implicating the other, and made in his absence, were thus held inadmissible, it is equally plain that acts and utterances of co-defendant Corbett, done in the absence of Fitzpatrick, cannot be held admissible evidence against Fitzpatrick since they were obviously introduced by the prosecution for the purpose of connecting Fitzpatrick with the crime for which he was then under trial alone.

Moreover, as in the Sparf and Hansen case, the criminal

act had been committed and the conspiracy assumed upon the Government's theory of the case (whether existing in fact or at any time) had come to a complete end. Nothing that Corbett could thereafter do or say which would tend to connect Fitzpatrick with the crime, and which was not done or said in the presence of Fitzpatrick, could or should, upon plainest principles of justice, be held admissible evidence against Fitzpatrick on the trial of the indicted parties, whether held jointly or separately. The authorities cited in Sparf and Hansen *supra*, so clearly hold this to be the law, that we need not extend this brief with further citation thereof.

Equally incompetent was the evidence sought to be wrung from witness Ballard, to compel him to identify Corbett, by subsequent inquiry, as the party who had applied to him on the night of the homicide, with the declaration that he had been shot, and seeking his aid in obtaining a doctor. The same objection applies to the testimony of Doctor Price, who was permitted to testify that on the morning of the homicide he had been called upon to attend Corbett; had found him wounded, and had thereafter attended him for some three weeks or a month.

While all of this could be perfectly true, it had no place in relation to this case or to the crime alleged, for which Fitzpatrick was then alone on trial. It all went to the jury as having important relation to Fitzpatrick's guilt or innocence, when, in truth, it was wholly irrelevant and incompetent against him.

All of this irrelevant testimony was given added effect by like error in admitting the testimony of deputy marshal Cudihee, who testified to fitting Corbett's shoe to the sand prints about the Roberts' cabin where the homicide occurred.

It is plain that the Government's case proceeded upon one theory, while its evidence fell entirely short thereof. There was neither in the indictment nor in the proof any evidence of conspiracy to rob, nor would such evidence have been admissible upon the indictment as framed. The fact of the killing and the presence of Fitzpatrick were *the* matters to which relevant evidence could be properly addressed. The error of the Court arose in assuming the Government's theory and allowing proof to be introduced with reference to Corbett's acts and declarations which did *not* in any manner connect Fitzpatrick therewith. All of this combined evidence with respect to Corbett, when viewed in the light of the express declaration of the Court in its charge to the jury, as to the theory of the Government in assuming a conspiracy to rob, could have had but one effect, namely, to impress upon the jury as material and relevant testimony against Fitzpatrick the evidence introduced as to Corbett's acts after the commission of the offence, and which, on obvious principle, was inadmissible against Fitzpatrick. The cumulative effect of this evidence with respect to Corbett, and relating to acts and occurrences with which Fitzpatrick had manifestly nothing to do, and which occurred without his presence, cannot, on any possible ground, be held as harmless error. Its effect was direct, positive, and in highest degree injurious to him.

Upon the Government's own theory of a conspiracy to rob, or even to commit murder (which the charge of the Court to the jury stated in express terms), the testimony relating to Corbett was inadmissible.

For whilst (with abundant citation of authority) the rule is well stated in *American and English Encyclopædia of Law*, 2d Edition, Title, Conspiracy, page 866—

"When the fact of a conspiracy has been proved or "established by reasonable inference, the acts and declara- "tions of one conspirator in furtherance of, or made with "reference to, the common design, are admissible in evi- "dence against his associates,"

the further qualification is immediately expressed (p. 868) that—

"Until the conspiracy is found *aliunde*, the acts and "declarations of an alleged conspirator are inadmissible "to establish the connection with the conspiracy, of one "charged as a co-conspirator."

In present case such evidence of conspiracy is wholly lacking. We are hence unable to find any possible ground, either upon the Government's theory of the case, or otherwise, which can justify the admission of testimony as against Fitzpatrick, which relates alone and wholly to Corbett, and whether that evidence is addressed either to Corbett's own acts and declarations, or to the testimony of others in relation thereto, its introduction over objections necessarily impressed the jury to Fitzpatrick's prejudice.

III.

Error in Permitting Unrestricted Cross-Examination of Plaintiff in Error.

As shown by the bill of exceptions (R. 38–39) the direct testimony of Fitzpatrick was as follows:

"Q. Can you tell the jury where you were on the night "of the 12th of March, from about eleven o'clock in the "evening until the next morning?

"A. I was up between Clancy's and Kennedy's; I had "been in Clancy's up to about half past twelve or one "o'clock—about one o'clock, I guess. I went up to Ken- "nedy's and had a few drinks with Captain Wallace and

"Billy Kennedy, and I told them I was getting kind of "full and I was going home, and along about a quarter "past one Wallace brought me down as far as Clancy's, "and then he took me down to the cabin and left me in "the cabin, and we wound the alarm clock and set it to "go off at six o'clock; and I took off my shoes and laid "down on the bunk, and woke up at six o'clock in the "morning and went up the street.

"Q. Now, is the Kennedy and Wallace that you refer "to the witnesses that are mentioned in the affidavit of "Corbett and Brooks for a continuance; you heard the "affidavit read?

"A. Yes, sir."

On cross-examination the Government was permitted, over objection by defendant's counsel, to propound questions which went far outside the facts testified to by Fitzpatrick on his examination-in-chief. These interrogatories, with the objections and exceptions taken to each, appear at length in the bill of exceptions (R. 39, 40). They related to the witness' attire on the night of the shooting; to his acquaintance with Corbett; whether Corbett had shoes of a certain kind, and whether witness saw Corbett on the evening of March 12th, the night preceding the shooting, and whether Corbett roomed with Fitzpatrick in the latter's cabin, and whether the witness saw anyone else in the cabin besides Brooks and Corbett.

None of these questions had any relation whatever to Fitzpatrick's testimony on direct examination. They were asked in connection with testimony which had been given by other witnesses for the Government, and were evidently so asked for the purpose of corroborating and sustaining the Government's case. In this there was manifest error.

In Amer. and Eng. Ency. of Law, Vol. 29, Title, Witness, p. 669, the rule is well stated as follows:

"There is eminent authority to the effect that the ac-
" cused may, in his direct examination, stop at any point
" he chooses, and that his constitutional privilege pro-
" tects him from cross-examination on any point not
" touched upon in his examination-in-chief. And in a
" number of jurisdictions it has been provided by stat-
" ute or settled by judicial determination that the cross-
" examination of the accused shall be confined to the
" matters concerning which he testified in his direct
" examination."

The foot-note following this statement recites that—

" This rule has been adopted in Oregon. See State *v.*
" Lurch, 12 Ore. 99; State *v.* Bacon, 13 Ore. 143; 57
" Amer. Rep. 8; State *v.* Gallon, 18 Ore. 425."

To the same effect are Judge Cooley's observations as given in his work on *Constitutional Limitations*, 6th Ed., 384, 386, thus:

" If he does testify, he is at liberty to stop at any point
" he chooses, and it must be left to the jury to give a
" statement, should he decline to make a full one, such
" weight as under the circumstances they think it entitled
" to, otherwise the statutes must have set aside the Con-
" stitutional maxim which protects an accused party
" against being compelled to testify against himself, and
" the statutory privilege becomes a snare and a danger."

In State *v.* Lurch, *supra* (12 Ore. 99), the Court said:

" The statute of the State which allows the accused in
" such a case to be a witness, provides that when he offers
" his testimony as a witness in his own behalf, he shall
" be deemed to have given to the prosecution a right to
" cross-examine him upon all facts to which he has testi-
" fied, tending to his conviction and acquittal (Laws, pp.
" 28, 29). But this does not compel him to be a witness
" against himself beyond such cross-examination. The

"humane principle of the law that a party shall not be "compelled to be a witness against himself otherwise re- "mains in full force, and is as effectually violated when "the cross-examination of the accused is extended be- "yond the facts to which he has testified, as it would be "if he were to be called and made to testify at the in- "stance of the State. The object and purpose of the "statute referred to were to afford an opportunity to the "accused to relate his account of the transaction in "which he is alleged to be implicated, and it would be a "great violation of good faith to permit the State to take "advantage of his situation and change the trial into an "inquisition. The cross-examination in such cases must "be strictly confined to the facts testified to by the ac- "cused. The law throws around him in such case an "immunity which ought to be sacredly maintained. "* * * Where the error consists of an infraction of a "constitutional guaranty in favor of personal liberty, "such as the compelling the party accused of a crime to be "a witness against himself, the law will presume an in- "jury, and the courts have no alternative but to adjudge "accordingly."

In *State* v. *Saunders* (14 Ore. 300), the same rule is affirmed and well stated by the syllabus, thus:

"Under the statute of this State allowing the accused "party to become a witness in his own behalf (Laws, 1880, "p. 28), it is error to compel him on cross-examination "to answer as to any facts not testified to on his direct "examination."

The statutory rule as thus expounded in Oregon, as shown by the cases cited from that State, has full application in Alaska where the criminal laws of Oregon were extended by the act of Congress of May, 1884, as shown, *supra*. For it must be true that with the adoption of the laws of Oregon, *eo nomine* in the district of Alaska, the judicial interpretation of those laws by the highest Court

of Oregon went with them to that district. We have here, therefore, as plainly controlling the case at bar, (1) the express statute of Oregon, and (2) its controlling judicial interpretation in that State, as demonstrating the error here complained of in allowing the cross-examination of Fitzpatrick to extend far beyond the testimony given by him in chief.

The plaintiff in error suffered under peculiar hardship in this regard. He stood alone upon his defence in Court, and was denied a continuance to enable the parties named in his examination-in-chief, with whom he stated he had passed the time until they took him to his cabin, to be summoned to Sitka to attend the trial. (R. 13.) The matters on which he was thus cross-examined, as disclosed by the bill of exceptions, were wholly foreign in detail and in effect to the facts testified to by him on his direct examination. All that he sought to do on his direct examination was to account for his whereabouts during the night and the hours of the morning preceding and following the shooting for which he was upon trial; they in no manner related to the clothes he wore; to his acquaintance with Corbett; to the latter's whereabouts, or to other details admitted as matter of cross-examination over the objection of his counsel. As stated above, all of such cross-examination was plainly addressed to an effort on the part of the Government to *compel* Fitzpatrick to admit or deny the statements made by other witnesses for the Government who had already testified before the jury. No case can hence be imagined where the wrong and injustice accomplished by this erroneous latitude of cross-examination could more clearly appear. Standing on trial for his life; denied any postponement to enable witnesses to be summoned in his defence, he was compelled to take the stand or remain mute. The simple narrative of his

whereabouts and doings on the night preceding and the hours of the morning following the shooting is all that he attempted to give. Wandering far away from that simple narrative the Government was permitted to cross-examine him at length upon matters and details which could have no possible relation to these simple facts as to his whereabouts, which he had alone given in his direct examination. In effect he was asked to affirm the testimony theretofore presented by the Government to the jury on these outside matters.

Witness Doll (R. 74), introduced for the Government, had undertaken to identify Fitzpatrick and give his attire, as he alleges he saw him at the door of the Roberts' cabin an hour or two before the shooting occurred. In cross-examining Fitzpatrick the Government plainly sought to compel him to incriminate himself in corroborating the testimony of Doll in this vital particular. We submit that the constitutional guaranty of protection extended to Fitzpatrick was plainly violated, and against a man who stood alone and deprived of all opportunity to produce witnesses in his defence in meeting a charge which involved his own life. As showing the wide range of cross-examination upon matters wholly foreign to Fitzpatrick's direct examination, we quote from the assignment of errors (R. 107) as follows:

"The foregoing being all the testimony of the said wit-
" ness in his examination-in-chief, the Court erred in
" permitting said witness to testify upon cross-examina-
" tion and admitting under such examination the follow-
" ing evidence: Anything concerning who roomed with
" the witness in the cabin; whether the defendant wore
" boots or shoes that night; whether he wore that night
" the same suit of clothes he had on in Court; what kind
" of a suit he did have on; whether he wore that night

" the same hat he then had in Court; whether he had a " fur cap also; whether at the time of the homicide the " witness had a mackinaw suit with a large belt and " buckle; what business the witness was engaged in for " Wilson and Kennedy; what sort of clothes he had been " wearing a week or two previous to the homicide; " whether or not he had a pair of rubber boots; how " long he had known William Corbett; whether or not " Corbett had a pair of shoes with nails in the bottom of " them; when he first saw Corbett on the 13th of March, " 1898; whether he saw him on the evening of the twelfth " of March, 1898; whether he remembered what kind of " shoes he had on that evening; whether anybody else " was in the cabin with defendant besides Brooks and " Corbett; all of which testimony was admitted under " defendant's objection."

IV.

There was likewise plain error duly reserved in the bill of exceptions (R. 41), in permitting the Government, in *rebuttal* to call and examine witnesses upon the effect of a pistol shot, as giving light sufficient to enable identification thereby.

No testimony on this point was introduced by the defendant. It was a part of the Government's opening, if admissible or material at all. The shooting occurred in the dark; identification of the accused then on trial, as the party who committed the act, was *the* foundation of the Government's case.

When the Government rested and the defendant submitted no testimony whatever in any manner relating to such a subject, it was manifest error to permit the Government to again enter upon its main case, by way of rebuttal, and leave these last impressions upon the jury, in this regard and on this important subject in its relation

to the case, without any opportunity whatever to the defendant to meet such testimony.

V.

It is further assigned as error that the Court erred in qualifying the instruction No. 1, given at defendant's request, with respect to the necessity of proof of conspiracy or common design, in the following language:

"Unless you shall find, beyond a reasonable doubt, that "the defendant wantonly shot and killed deceased with- "out excuse or justification." (R. 41.)

This qualification went far beyond the indictment and the charge made thereby. If Fitzpatrick had been indicted alone, the instruction might have been admitted, but when the Government's own theory, both in indictment and trial, rested upon a conspiracy, it was manifest error to inject therein a new and totally different factor, and to so instruct the jury as against Fitzpatrick alone, that irrespective of the charge as laid in the indictment and *any* proof of conspiracy in connection therewith, defendant could be, under such circumstances, tried alone and convicted of murder upon such wholly different ground.

We submit the judgment should be reversed and new trial awarded.

Respectfully submitted.

A. B. BROWNE,
JULIUS KAHN,
ALEX. BRITTON,
Atty's for Plaintiff in Error.

MAY 8 1900
JAMES H. McKENNEY,
Clerk.

No. 499. IN THE

Supreme Court of the United States.

Sup. Ct. of Browne, Kahn & Brit

OCTOBER TERM, 1899.

for P. E.

JOHN FITZPATRICK,
PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

Filed May 8, 1900. No. 499.

In Error to the District Court of the United States for the District of Alaska.

Supplemental Brief for Plaintiff in Error. In re Jurisdiction.

A. B. BROWNE,
JULIUS KAHN,
ALEX. BRITTON,
Attorneys for Plaintiff in Error.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
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JOHN FITZPATRICK,
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v.
THE UNITED STATES.

No. 499.

In Error to the District Court of the United States for the District of Alaska.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

IN RE JURISDICTION.

Plaintiff in error was indicted, tried and convicted for the crime of murder. Pursuant to the Act of January 15, 1897 (29 Stats., 487) the jury qualified the verdict with the words "without capital punishment."

By permission of the Court the cause was submitted for the plaintiff in error on April 30 with leave to the

Solicitor-General to file brief for the Government within one week. We could not ask at this stage of the term for further time wherein to make reply thereto. The Government's counsel orally suggests to us, however, that the Court is without jurisdiction to review the sentence and judgment herein, because the plaintiff in error has not been convicted "of a capital crime," and which is alone reviewable here since the passage of the Act of January 20, 1897 (29 Stats., 492). We cannot permit the suggestion to go without answer, and hence beg to submit that such view is erroneous, because—

I.

The Act of March 3, 1891 (Sec. 5), gives direct appeal or writ of error from the District or Circuit Courts (*inter alia*)

"In cases of conviction of a capital or otherwise in-
"famous crime."

The crime of murder in the first degree is punishable by the law of Oregon (applicable here), and by Section 5339, U. S. Revised Statutes, by infliction of the death penalty. The power given the jury under the Act of January 15, 1897, *supra*, to qualify the verdict of guilty with the words "without capital punishment," does not make the *crime* any the less capital in every legal sense. The test is not the punishment which *is* imposed, but which *may be* imposed.

Such legal effect is imputed by this Court to the Act of March 3, 1891 (and the jurisdiction conferred thereby upon this Court), in the cause entitled, "*In re, Claasen*" (140 U. S. 200–204), wherein the Court said:

"We are of opinion that the Act of March 3, 1891, went "into immediate operation, so as to permit a writ of error "to be allowed in the present case, as the final judgment "against the defendant, by his sentence, was not rendered "until March 18, 1891. The case was one of conviction "of an 'infamous crime,' within the meaning of the Act, "as those words have been heretofore interpreted by this "Court. It was held in *Ex parte Wilson*, 114 U. S. 417, "that a crime punishable by imprisonment for a term of "years at hard labor is an infamous crime, within the "meaning of the Fifth Amendment to the Constitution of "the United States. See also *Mackin* v. *United States*, "117 U. S. 248; *Parkinson* v. *United States*, 121 U. S. "281; *United States* v. *De Walt*, 128 U. S. 393; *Medley*, "*Petitioner*, 134 U. S. 160, 169; and *In re Mills*, 135 U. "S. 263, 267. The purport of the rulings in those cases "is, that a crime which is punishable by imprisonment "in the State prison or penitentiary, as is the crime of "which the defendant was convicted, is an infamous "crime, whether the accused is or is not sentenced or put "to hard labor; and that, in determining whether the "crime is infamous, the question is, whether it is one for "which the statute authorizes the Court to award an in-"famous punishment, and not whether the punishment "ultimately awarded is an infamous one. So it is clear "that the crime in the present case is an infamous crime, "although it does not appear that Section 5209, or the "sentence imposed, expressly provided for imprisonment "at hard labor."

This rule is reaffirmed in *Logan* v. *United States* (144 U. S. 263, 308).

By clear analogy, it is plain that as murder is a capital offence, which may be punishable with death, the jurisdiction of this Court hence remains to review such conviction even with a life sentence (under the verdict of the jury) so imposed. And if, upon review of such record in an appellate Court, the sentence and judgment were reversed and the plaintiff in error again put upon trial, it

is manifest that he could then be found guilty without qualification and suffer the death penalty. This demonstrates that he has in law been convicted of a capital crime. It is certainly not an "otherwise infamous crime."

II.

The plain and natural reading of the Act of January 20, 1897, *supra*, leads to the same conclusion. That Act is as follows:

"That so much of section five of the Act entitled 'An " 'Act to establish Circuit Courts of Appeals and to de- " 'fine and regulate in certain cases the jurisdiction of " 'the courts of the United States, and for other pur- " 'poses,' approved March third, eighteen hundred and " ninety-one, as reads 'in cases of conviction of a capital " 'or otherwise infamous crime,' be amended by striking " out the words 'or otherwise infamous,' so that the same " will read 'in cases of conviction of a capital crime'; and " that appeals or writs of error may be taken from the " District Courts or Circuit Courts to the proper Circuit " Court of Appeals in cases of conviction of an infa- " mous crime not capital. * * *"

It is plain therefrom that the Circuit Courts of Appeals are given jurisdiction by way of review only "in cases of " conviction of an infamous *crime, not* capital." Or, in other words, of such crimes as *cannot* be punished by infliction of the death penalty. Murder in the first degree is, under the law applicable here, a capital crime, and its classification as such cannot be altered nor changed by the circumstance that in some particular case the jury has qualified its verdict by relieving from capital punishment.

It hence results that all cases wherein the punishment of death may be inflicted are reserved to the exclusive

jurisdiction of this Court on review. Otherwise, the singular result would obtain that conviction of murder, with life imprisonment as the penalty, could be reviewed only in the Circuit Courts of Appeals. If reversed there, and upon new trial the defendant be found guilty and sentenced to death, the record of his second trial and conviction could only then be reviewed in this Court. Congress plainly did not intend to thus shift the jurisdiction by the test of actual punishment imposed rather than by the definition of the crime. The plain reading of the statute forbids such conclusion.

III.

It is scarcely necessary to suggest that the Act of January 15, 1897, *supra*, did not change existing law so as to make murder, as a crime, any the less a capital offence. The act is correctly construed by the Court of Appeals of the District of Columbia, in *Fearson* v. *United States* (10 App. D. C. 536, 542) thus:

"There is no pretence anywhere in the Act of January "15, 1897, either express or by implication, to provide a "penalty for the crime of murder different from the pre- "vious penalty in any case whatever except where the "jury has rendered a qualified verdict. For that event "and for that event alone, the act provides, so far as the "two sections cited are concerned; and we fail to find "any inconsistency whatever between the provisions of "the statute in that regard, and the continued force and "operation of previous statutes providing for other and "entirely different contingencies. We are satisfied that "the Act of January 15, 1897, is limited, and was in- "tended by Congress to be limited, so as not to repeal or "in any manner to affect previously existing law beyond "its provision to allow the jury, upon a trial for the of-

" fence of murder, to determine by its verdict whether the " sentence should be that of death or that of imprison- " ment for life. We think that, so far from its provisions " being inconsistent with the continued operation of " other statutes providing for the imposition of the pen- " alty of death, they would be unintelligible and unreas- " onable in the absence of those statutes."

We submit this Court has full jurisdiction to hear and determine this cause upon the pending writ.

Respectfully submitted.

A. B. BROWNE,
JULIUS KAHN,
ALEX. BRITTON,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

JOHN FITZPATRICK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 499.

BRIEF FOR THE UNITED STATES.

STATEMENT.

THE CASE.

At the May term, 1898, of the district court for Alaska, John Fitzpatrick was jointly indicted with Henry Brooks and William Corbett, charged with the murder of Samuel Roberts on March 13, 1898, at Dyea. After a demurrer to the indictment, which was overruled, and a motion for continuance, which was denied, separate trials were demanded by Brooks and Corbett. Fitzpatrick was first tried, and on June 1, 1898, found guilty

"without capital punishment." Thereupon he was sentenced to be imprisoned at hard labor for life in the penitentiary at San Quentin, Cal.

THE FACTS.

The entire testimony given on the trial appears in the record, pages 43 to 102, inclusive. It is brief, to the point, and vividly presents a tragedy not without interest.

The murder took place in Dyea, Alaska, just outside of the cabin of Roberts. Roberts ran the games at the Wonder Hotel or saloon and slept in his cabin across the street about 150 feet from the saloon. The cabin was a small wooden building 12 by 12 feet, with one door and one window fronting the street and the Wonder Saloon. The approach to the door was by steps and a small platform. The cabin stood back 100 feet from the street in a clearing containing a good deal of lumber, some piled, other scattered about. Ross and Brennan, two of the witnesses for the Government, were employed by Roberts in connection with the games. Brooke, a witness for the Government, was a sailor who happened to be in the Wonder Hotel at the time of the murder. Taylor, another witness for the Government, was night watchman in the street in front of the Olympia Hotel, about two blocks from the Wonder. Ballard, another witness for the Government, was a regular soldier on guard that night not a great distance from Roberts's cabin. Doll, another witness for the Government, was a teamster and stable boss, who worked not a great way

from Roberts's cabin and passed it the night of the murder on his way home. Cudihee, another witness, was the deputy United States marshal who arrested the accused and examined the premises and investigated the crime. Dr. Price was a physician at Dyea, who examined Roberts's body after his death, and also attended Corbett, who was shot that night. These were the leading witnesses for the prosecution.

John K. Ross testified that about 2 o'clock on the morning of March 13, 1898, Roberts, the deceased, asked the witness to accompany him from the Wonder Hotel to his cabin and carry a sack containing the money used at the games. This sack weighed between 40 and 50 pounds. Roberts was in the habit of going to his cabin every night accompanied thus by a man carrying the sack. Sometimes one employee did this, sometimes another. The witness and deceased proceeded to the cabin. They went up the steps, Roberts unlocked and opened the door, and both stepped inside. Roberts struck a match, or rather two, and while the sulphur was burning on these matches they heard the rustle of a piece of tin and Roberts cast his eyes toward the witness, as much as to say, something is wrong. Both stepped out of the door. Instantly there was a report of a gun inside of the cabin. Roberts crowded witness off the porch. The sack of money fell off the witness's shoulder and he fell off the steps. As he was falling, Roberts got to the ground and was standing with a gun in his hand facing the cabin door and backing away. *Just as witness hit the ground he heard a report of a pistol from the outside of the cabin and soon heard*

hurried footsteps pass close to him. He then heard the report of a gun from the inside of the cabin. In a few seconds a man came out from the inside of the cabin, stood on the porch, *raised his gun quite high, and fired two shots in the direction of the Wonder Hotel,* turned to the right in a leisurely manner, got off the steps and disappeared behind the north side of the house. *The witness recognized this man as John Fitzpatrick, the defendant.* On cross-examination (Record, p. 52) witness stated that while the night was dark he identified Fitzpatrick by the flash of the pistol shots. As Fitzpatrick disappeared the witness called for help, and presently Brennan and others came over from the hotel with a lantern. Roberts was found lying on his back, his feet toward the cabin door. He gave a gasp and died.

Terry Brennan testified that he was working at the games with Roberts; that about 2 o'clock the morning of March 13, after they had got through, he went to the stove and sat down and commenced reading, when Roberts called him to the door and said, "What are these lights burning over here in the foothills," and witness said he supposed they were people going inside. Roberts says, "Klondikers?" and witness said, "I suppose so," and went and sat down by the stove and resumed reading. Roberts then asked Ross to get the sack and accompany him to the cabin; which Ross did, and started over with him. In a few minutes witness heard a shot and started toward the door, but before he got to the door there was another shot, and when he got outside on the pavement there was another shot, and then he commenced to call to Roberts. Getting no answer, he commenced to call to

Ross, and he didn't get any answer, and then he started toward the cabin, and there were two shots fired, and he turned around and fled. Witness was then about 15 or 20 feet from Roberts's cabin. *The shots came from the cabin.* Witness then ran back to the hotel, got a gun, took a lantern, and ran straight across, the crowd following him. He found Ross first, then the sack of money at the foot of the steps, and then Roberts, on his back, dying.

John Lewis Brooke, who had been employed on the battleship *Oregon* and then on the *Concord*, testified that he saw Roberts at the Wonder Hotel the morning of March 13, just as he was getting ready to go over to his cabin. He walked out of the house. Two or three minutes after he left the house the witness heard a shot and got up and ran out toward the place, and he heard two more shots fired, *and a man ran toward him*, and then turned around like that. This was a slight-built man. He was running away. There was a light from the hotel, from the window, and there was a streak from there over to the corner, and witness saw him probably three or four seconds. The witness and Brennan found Roberts 15 feet away from the steps dead. The money was lying 3 or 4 feet from the steps. The shots, two of them, came from the door of the cabin straight toward witness.

It appears on cross-examination that the witness and others had started from the hotel to the cabin, but were turned back by the last two shots.

Leroy W. Taylor was night watchman at the Olympia Hotel on the night of March 13. The Wonder saloon was two blocks from the Olympia. The witness was in

the street in front of the Olympia all night. Between 2 and 3 o'clock in the morning *he saw a man run up the street right opposite to where he was, go over to a lumber pile and then join two other men on the other side of the lumber yard and then continue on up the street the other side of the lumber yard.* Just previously, the witness heard shots from the direction of the Wonder Hotel saloon, three or four altogether. The men came from the direction of the Wonder saloon and Roberts's cabin.

Phillip Ballard testified that he was a regular soldier on guard duty the morning of March 13. About 2 o'clock that morning he heard four or five shots from the direction of Roberts's cabin and the Wonder saloon. *Fifteen or twenty minutes, or half an hour after the firing, a man came to the cabin where witness was, rapped at the door, which witness opened, and said to witness that he would like to get a doctor; he was shot.* Witness directed this man to the hospital in town, and he went that way. Witness was afterwards told that this man's name was Corbett. Corbett was brought into court and identified by the witness, but not very clearly, however.

Dr. T. L. Price testified that he was a physician and surgeon; that he examined the body of Roberts on March 13, and found a bullet wound in the right breast, diagonally across the chest, penetrating the lungs and heart and coming out back of the left shoulder. This witness also testified that *about 3 o'clock on the morning of the 13th of March he was called to the Skagit saloon and found Corbett with a wound in his right shoulder.* He sent Corbett to the hospital and attended him for three weeks or a month.

Charles Doll testified that he was a teamster and stable boss for Dock Cleveland. About 12 o'clock on the evening of the 12th and morning of the 13th of March the witness was going home from his work and passed the Roberts cabin. *He saw two men standing in the door and partly on the platform and recognized Fitzpatrick as one of them.* Witness recognized him by flashing his lantern on him.

On cross-examination the witness stated that he recognized the man with Fitzpatrick at the cabin that night as Brooks, jointly indicted with him. Fitzpatrick was dressed in a yellow Mackinaw suit, with a leather belt and buckle in front and a fur cap on. The other man had a dark suit on.

John Cudihee, deputy United States marshal at Dyea, testified that he arrested Fitzpatrick, Brooks, and Corbett the day of the murder and made an investigation. He found Roberts in his cabin dead. Then he went to Fitzpatrick's and Corbett's cabin. *He found there a lot of shoes and clothing covered with blood. The witness produced the shoes in evidence, pointed out which pair was Fitzpatrick's and which was Corbett's, explaining that Fitzpatrick had identified the shoes in his office and pointed out which pair was Corbett's and which was his.* The witness also pointed out the blood stains on both shoes. Corbett's shoe fitted the footprint which the witness found in the rear of Roberts's cabin, perfectly. The shoe had hobnails in it, and the heel was worn off so the print in the sand was a peculiar one. In Roberts's cabin there was a table standing between the

cabin door and the window, and there was a mark where a bullet, afterwards found in the cabin, went through the table and struck the casing of the door. This was on the inside. The curtain at the window was cut across about an inch and a half on top and then ripped down about 4 or 5 inches. The door in the cabin was at the left and swung to the right when opened. The window was to the right of the door. The footmark, which Corbett's shoe fitted perfectly, was at the corner of the cabin where there was a pile of lumber. It was as if Corbett had sat on the pile of lumber looking around the corner and across to the Wonder saloon. One bullet was found in Roberts's clothes and another inside of Roberts's cabin.

For the defense, Fitzpatrick took the stand and swore to an alibi. His testimony will be commented on later. The only additional testimony offered in Fitzpatrick's behalf was a calendar of March, 1898, as it appears in Ayer's Almanac, the affidavit of Corbett and Brooks giving their whereabouts on the evening of the 12th and the morning of the 13th of March, and an affidavit of Mary Dickson with reference to the reputation and character of Fitzpatrick.

In rebuttal, the Government introduced Deputy Marshal Snook, with respect to Fitzpatrick's reputation in Dyea, and Captain Young, of the United States Marine Corps, and Dr. White, of the United States Navy, with respect to the possibility of recognizing a man by the flash of a revolver at night.

ARGUMENT.

I.

INDICTMENT SUFFICIENT.

It is contended that under the act of May 17, 1884, providing a civil government for Alaska, the general laws of Oregon are declared to be the law of Alaska, so far as the same may be applicable, and that tested by the law of Oregon the indictment is insufficient, because it does not charge the crime of killing *eo nomine*, or as done with deliberate malice.

The law of Oregon grades murder, dividing it into murder in the first degree and murder in the second degree. Murder in the first degree is thus defined:

> If any person shall purposely, and of deliberate and premeditated malice, or in the commission or attempt to commit any rape, arson, robbery, or burglary, kill another, such person shall be deemed guilty of murder in the first degree. (Sec. 1714, Hill's Annotated Laws of Oregon, 1892, Vol. 1, p. 889.)

If Fitzpatrick had been indicted under this section, it would not have been necessary to charge him with "deliberate and premeditated malice." It would have been sufficient, in view of the facts of the case, to charge him with killing Roberts purposely "in the commission or attempt to commit a robbery or burglary." But Fitzpatrick was not indicted or punished under the law of Oregon defining murder. He was indicted under section

5339 of the Revised Statutes of the United States, which provides that:

> Every person who commits murder * * * in any place or district of country under the exclusive jurisdiction of the United States, * * * shall suffer death.

Following the law of Oregon relating to criminal procedure, an indictment must contain—

1. "The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties.

2. "A statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." (Hill's Anno. Laws of Oregon, sec. 1268, p. 768.)

In *State* v. *Dougherty* (4 Oreg., 209), and in numerous other cases, the supreme court of Oregon has held that under this section—

> The indictment should always contain such a specification of acts and descriptive circumstances as will upon its face fix and determine the identity of the offense, and enable the court by an inspection of the record alone to determine whether, admitting the truth of the specified acts charged, a thing has been done which is forbidden by law.

Section 1270 (Hill's Stat., p. 769), cited by opposing counsel, relates to the manner of stating the acts constituting the crime and provides:

> The manner of stating the act constituting the crime, as set forth in the appendix to this code, is sufficient in all cases where the forms there given

are applicable, and in other cases forms may be used as nearly similar as the nature of the case will permit.

It is true that in the appendix the following form is given for an indictment for murder:

> Purposely and of deliberate and premeditated malice killed C D by (shooting him with a gun or pistol, or, etc.).

It will be observed that section 1270 merely says that the manner of stating the crime as set forth in the appendix "is sufficient." It does not state that any other manner is insufficient. The form in the appendix is directory and not mandatory. The crime may be properly charged with greater particularity. The object of the Oregon provision was to relieve and not to embarrass the pleader. To charge the crime of murder under the Federal statute and at the same time comply with the criminal procedure of Oregon, it is sufficient to give "a statement of the acts constituting the offense in ordinary and concise language in such manner as to enable a person of common understanding to know what is intended."

> The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause, and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and

> intent, and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances. (Mr. Chief Justice Waite in *United States* v. *Cruikshank*, 92 U. S., 542, 558.)

The indictment in this case fully complies with all these requirements. It not only sets forth the acts, but the intent with which they were done.

The indictment charged that Fitzpatrick, Brooks, and Corbett did "feloniously, purposely, and of deliberate and premeditated malice" make an assault upon Roberts; and did "feloniously, purposely, and of deliberate and premeditated malice" discharge and shoot off a revolver, charged with gunpowder and leaden bullets, against and upon Roberts; and with a bullet fired from the revolver so discharged "feloniously, purposely, and of deliberate and premeditated malice" did strike, penetrate, and wound Roberts in the right breast, inflicting "one mortal wound, of which said mortal wound he, the said Samuel Roberts, instantly died." And so the jurors do say that Fitzpatrick, Brooks, and Corbett "did then and there kill and murder the said Samuel Roberts *in the manner and form aforesaid*," contrary, etc.

Is there any lack of intent here? The acts charged are alleged to have been done "feloniously, purposely, and of deliberate and premeditated malice." These acts are assaulting the deceased, shooting him, and inflicting upon him a mortal wound of which he instantly died; all being done purposely, feloniously, and of deliberate and premeditated malice. If this does not constitute murder, what does? If an indictment charges that the defendant feloniously, purposely, and of deliberate and

premeditated malice shot and killed the deceased, does it not sufficiently set forth the intent?

Of course there is a distinction between ordinary assault and assault with intent to kill. But the charge of feloniously, purposely, and of deliberate and premeditated malice, shooting and killing a man is equivalent to the charge of shooting him with intent to kill, and something more. A man who purposely inflicts a mortal wound does so with intent to kill and is guilty, where murder is graded, of murder in the second degree. But a man who purposely, *and of deliberate and premeditated malice* inflicts a mortal wound upon another, is guilty of murder in the first degree.

The indictment concludes by charging "That said John Fitzpatrick, Henry Brooks, and William Corbett did then and there kill and murder the said Samuel Roberts in the manner and form aforesaid." What is "the manner and form aforesaid?" First, that they assaulted Roberts; second, that they shot him with a loaded revolver which they held in their hands; and, third, that with the bullet so discharged they inflicted upon Roberts a mortal wound, of which he instantly died; and in each case it is charged that this was done "feloniously, purposely, and of deliberate and premeditated malice." It is impossible to see what more can be required under the second paragraph of section 1268 of the Oregon Code. Certainly there is enough "to enable a person of common understanding to know what is intended."

II.

THE TESTIMONY RELATING TO CORBETT WAS CLEARLY COMPETENT, NOT FOR THE PURPOSE OF CONNECTING CORBETT WITH THE CRIME, BUT OF SHOWING THE ENTIRE TRANSACTION.

The defendant objects to the action of the court in admitting the testimony of Dr. Price and the soldier Ballard, who testified that, shortly after the shots on the night of the murder, Corbett applied to them for help, stating that he was shot; and the testimony of Marshal Cudihee that on the morning after the murder he went to the cabin occupied by Fitzpatrick and Corbett, found a lot of bloody clothes and shoes, and brought two pair of shoes with blood on them to Fitzpatrick, one pair of which he identified as Corbett's, and that one of Corbett's shoes fitted perfectly the footprint in the sand near the corner of the Roberts cabin. It is claimed that, as Corbett was a coconspirator, his acts and declarations after the commission of the crime can not, under the decision in the case of Sparf and Hanson (156 U. S., 51), be used against Fitzpatrick.

I concede that if Corbett had made a confession after the crime had been committed and the criminal transaction had ended, implicating Fitzpatrick, such declarations or admissions could not be used against Fitzpatrick, but no confessions or admissions of Corbett implicating Fitzpatrick were introduced. The statement of Corbett to Ballard that he was shot related in no way to Fitzpatrick. This statement was a part of the act of seeking medical assistance, and nothing more. It was simply a

statement that he was wounded. That he was wounded must be admitted. The importance of the testimony lay in the fact that a few minutes after the shooting had taken place, and within a short distance of the scene of the murder, at an unusual hour this man Corbett appeared to the witnesses with a wound in his right shoulder. It was the fact that Corbett was there at 3 o'clock in the morning in the immediate neighborhood of the murder, from which three persons had fled, wounded and seeking assistance, that was important.

Consider the circumstances. Fitzpatrick and Corbett roomed together. Their bloody clothes and shoes were found in their cabin the morning after the murder. Brooks had roomed with them. Brooks and Corbett, in their affidavit for a continuance (record, p. 14), in effect swear they were together that night; they attempt to establish a joint alibi. Fitzpatrick admits that the three of them were together between 7 and 8 o'clock the night of the murder. Between 12 and 1 o'clock that night Doll swears he saw and recognized Fitzpatrick and Brooks in the door of Roberts's cabin. Ross, who accompanied Roberts to the cabin, says the first shot was fired from inside the cabin. This bullet hit no one; it was found inside the cabin, according to Cudihee's testimony. The next shot came from outside the cabin, evidently from Roberts. Directly after it Ross *heard hurried footsteps pass close to him.* Part of the murderers fled then. Next, Ross heard the report of a gun from the inside of the cabin. This was the shot that "got" Roberts. In a few seconds Ross says a

man came from the inside of the cabin, raised his gun, fired twice in the direction of the Wonder Hotel to keep back the crowd that was rushing over from there, and then fled. This man was Fitzpatrick. Brooks saw a man running away from the cabin. Taylor, night watchman at the Olympia, two or three blocks from the Wonder, a few minutes after the shots were fired saw a man run up the street from the direction of Roberts's cabin, join two other men at a lumber pile, and then continue up the street.

Here is testimony enough to show that the murder was committed by three men, acting jointly; in other words, that there was a conspiracy. In convicting one of the principals in a murder like this, it is necessary and proper to lay before the jury the entire transaction, the acts and conduct of all who are engaged in the commission of the crime until the transaction is completely closed. Action immediately following a crime, which is caused by and is the direct result of the crime, is really a part of the transaction. Corbett's wounded condition directly after the murder was important, not as showing what he had said or done subsequent to the murder, but as proving that he was present at the murder. His presence at the murder was admissible in Fitzpatrick's case as a part of the actual transaction which had to be presented fully to the jury in order that they might understand the crime. In this case Corbett may be considered not as a man indicted and on trial for the crime, but as an animal, so associated with the accused that proof of its presence at the scene of the murder became material and relevant in determining the guilt of the accused. Let me illustrate the point.

Suppose Roberts had been held up by a highwayman, Fitzpatrick, who rode to the scene of the crime on horseback, but had dismounted when he made the assault upon Roberts. Suppose shots were exchanged, an alarm raised, and upon the arrival of help, the murderer fled, his horse going in one direction and he in another. Upon the examination of the ground the next morning a peculiar print made by a horseshoe was found. Would it not be perfectly competent to show that directly after the murder Fitzpatrick's horse was found wounded, not for the purpose of showing the horse committed the murder, but was *there* when the murder was committed? Would it not be competent to show that the next day it was found that a particular shoe worn by Fitzpatrick's horse fitted the mark at the scene of the murder perfectly?

Again, with reference to showing that Corbett, wounded, applied for help immediately after the murder. Suppose that Roberts had had a personal tussle with his assailants and had grabbed and held the cap of one of them. Would it not be competent to show that Corbett was seen a few minutes after the murder bareheaded, and to show that the cap clinched in Roberts's hands was Corbett's cap? In short, where several men are charged jointly with the commission of a crime it is competent, in establishing who were present, *to show what was left on the ground or carried away by any one of them*, no matter which of the principals is on trial. *In this case, Corbett left a footprint and carried away a wound.* He both left and carried away evidence of his presence there.

Let me refer to a few cases showing clearly that the testimony was competent.

The first case, that of *People* v. *Cleveland* (107 Mich., 367), is so directly in point and so fully answers the objections made in this case that I quote freely from it. Cleveland was informed against jointly with Robert Mehan and Frank Swidenski, for assault with intent to commit murder. He was tried separately. The evidence disclosed the fact that these three parties had driven in a carriage, hired by Swidenski, at Jackson, to the place of assault. The assault was made upon one Weatherwax, a storekeeper, who, after his store had been closed for the night, was called upon by a man who pretended he wanted to purchase cheese and crackers. Taking a lighted lamp in his hand, he went to his store and was preparing to get the cheese when he was confronted by two men, who, with drawn revolvers called upon him to throw up his hands. Instead of doing so Weatherwax attacked one of his assailants, striking him over the head with his lamp and extinguishing it. He continued striking his assailants over the head with the broken lamp until, although twice wounded, he escaped. At 1 o'clock the next morning Cleveland returned the horse and carriage hired by Swidenski. Mehan became separated from the other two and made his way to Jackson on foot. He was seen the next morning within 2 miles of the place of assault, going in the direction of Jackson. At that time he was without a hat, and had cut out the pocket of his coat, and drawn it over his head as a skull cap. These facts were proven on the

trial of Cleveland, over the objections and exceptions of his counsel, who insisted, among other things, there was error—

> In permitting the people to show the acts of Mehan after the affray, his appearance on the way to Jackson and on the succeeding days, the excuse he gave for his then condition, and the result of an examination of his clothing.

Answering that contention, the court said (p. 370):

> It is apparent from the testimony that the three parties, when they left Jackson, had arranged to engage in this robbery. We think there was evidence for the jury to determine the identity of the three on their way there, and there can be little question from the testimony that they were at the store, two of them entering it and one remaining outside. Mr. Weatherwax testified that he recognized respondent Cleveland as the masked man, and who fired one of the shots. By the proofs it was established that a prior arrangement had been made to commit the robbery, and the arrangement had been carried out so far as they were able to do so. It was therefore proper to show the condition of Mehan, who was not on trial, for the purpose of establishing his identity as one of the men who accompanied respondent Cleveland from Jackson to Somerset Center, thus identifying the latter's connection with the robbery. In the case of *Ryan* v. *State* (83 Wis., 486), the charge was burglary. Evidence was admitted, under objection, showing the movements and conduct of each of three persons charged with the crime on the next morning after the robbery, and after they had separated. The prosecution having shown that these persons were seen together shortly before the

> crime, this evidence was held competent. It is true that, when the subsequent facts sought to be shown are in the nature of a narrative by one of the parties to the transaction, such narration is inadmissible as evidence against a corespondent; but in the present case no such statements were sought to be shown, and it was competent to show the condition of any one of the three, immediately after the affray, which would throw any light upon the question of the identity of Cleveland as taking part in the crime charged. What Mehan said as to his condition, as shown by the testimony here, was in no manner prejudicial to the respondent, as its tendency would be to show that respondent was not in his company at the time he received his injuries. (Citing 71 Iowa, 11.)

So in *Ryan* v. *State* (83 Wis., 486), where Ryan was jointly charged with two others with the crime of burglary (and was tried separately), proof was given of the conduct and movements of the three persons charged with the burglary on the next morning after it was committed, and the connection of each of such persons with the goods stolen when the burglary was committed. This was assigned as error. The court, answering the contention, said (p. 492):

> There was testimony tending to show that the three accused parties were together recently before the burglary was committed, and some of them were after, and that each of them had some of the goods stolen from Welsh's house. We are of the opinion that such testimony was a sufficient basis for the admission of other testimony tending to show the conduct and movements of any or all the accused parties recently after the crime was committed.

> Under the circumstances which the testimony tends to prove, such recent conduct and movements were, in some sense, really parts of the *res gestæ*, and properly provable as such.

State v. *Struble* (71 Iowa, 11) was a case wherein Frank Struble was jointly indicted with Thomas Struble and John McBride for the crime of burglary, but was tried separately. Struble, having been convicted, assigned as error the admission of certain testimony relating to the acts of his co-conspirators after the burglary was committed. The court held this evidence proper, taken in connection with other testimony, as a circumstance tending to show the guilt of the parties, and that it was really a part of the transaction.

In *Angley* v. *State* (35 Texas Criminal Report, 427) Angley was separately indicted and tried for an assault with intent to rob, committed by himself and one Hess Rice. Upon the trial the court permitted a witness for the State to testify to the fact of his having seen Angley and Rice together, near the place of the assault, on the day of its commission, about daylight. The assault was committed about 2 o'clock in the afternoon. To the admission of this testimony Angley objected on the ground that it was too remote from the main fact—identity. The court, however, held this testimony proper, as a circumstance tending to show that the parties were in the neighborhood of the scene of the assault on that day.

Another ground of error was that the State was permitted to show the character of shoes Rice had on when arrested the day after the assault. One ground of the

objection was that Rice was not jointly indicted with Angley. After the assault the tracks of two men were found near the house; one being that of a No. 9 shoe and one of a No. 7 shoe. The track made by the No. 7 shoe was peculiar, in that it evidently had a hole in the bottom of the sole. When arrested, Angley was found to have worn a No. 9 shoe and Rice a No. 7. When Rice was arrested and his shoes examined, it was found that one of his shoes had a hole in the sole corresponding with the peculiarity in the track as found upon the ground.

The court held this testimony proper, although Rice was separately indicted, because the conspiracy had been shown, and this "was a circumstance tending to show that he was one of the parties present at the time the assault was committed, and as tending to corroborate the positive testimony of Mrs. Butler," the person assaulted (p. 134).

So, in this case, the testimony of the witnesses concerning Corbett, to which exceptions are taken, relates not to what was said by Corbett, but to his whereabouts, his condition, and conduct immediately after the commission of the crime, and is a circumstance proper to be shown as throwing light upon the entire transaction.

So, too, with respect to the testimony of Marshal Cudihee, as to the identity of the shoes found by him in Fitzpatrick's cabin the day after the murder. Fitzpatrick identified these shoes, not Corbett, and he can not complain if it is otherwise shown that the property he identified was present at the murder.

Further upon this point I refer the court to the cases of *State* v. *Shields*, 45 Conn., 256, 263; *Phelps* v. *State*,

15 Texas Appeals, 45; *Fisher* v. *Georgia*, 73 Ga., 595, 601.

III.

THERE WAS NO ERROR IN THE CROSS-EXAMINATION OF FITZPATRICK.

It is contended on behalf of Fitzpatrick that the court erred in permitting the prosecution to interrogate the defendant upon any point other than his whereabouts between the hours of 11 o'clock on the evening of the murder until the next morning.

The cross-examination as to the residence of witness in Dyea and his occupation there were merely preliminary; they were not objected to at the time, and their competency can not now be questioned. (*Benson* v. *United States*, 146 U. S., 332; *People* v. *Collins*, 48 Calif., 277); some of his answers were not responsive to the questions, and his answers in no way prejudiced his case. The answers themselves showed there was no prejudice; they were not contradicted by the Government, and the Government was bound by them; they were favorable to the prisoner; and this being true, the immateriality or propriety of the questions is of no importance, and furnish no ground for reversal on error (*Cochran* v. *United States*, 157 U. S., 286, 291).

Admitting for the sake of argument that it was improper to ask the witness if he had ever been convicted of any crime, his answer was that he had not. No attempt was made to contradict the statement and the Government was bound by his answer. It was in his

favor and he was in no way prejudiced by it. (*Cochran* v. *United States*, *supra*.)

Objection was made to the cross-examination of the witness as to the kind of clothes he had on the night of the murder, and as to whom he was with, what he was doing, and as to who had been at his cabin during the night. The court permitted this upon the theory that it was competent for the prosecution to show every movement of the prisoner during the night, the character of his dress, the places he had visited, and the company he was in. This, for the purpose of testing his credibility and to see what truth there was in his statements as to his movements. In this connection, and for this purpose, it was competent to show how he was dressed. If the contention of counsel for Fitzpatrick be correct, then really no cross-examination is permissible; all that can be done is to repeat, parrot like, the questions put to the witness in chief. It was proper to interrogate the witness as to his conduct, acts, and movements on the night of the murder, because those acts and movements are not distinct and separated from the crime. It had been shown that he had been with Brooks on the night of the murder. Corbett in his affidavit (Record, p. 14) for a continuance swore that he would prove by certain witnesses that he was at Kennedy's place on the night of March 12, and until 3 o'clock on the morning of the 13th. It had been admitted by counsel for the Government (Record, p. 43) that if the witnesses were present they would so testify. Fitzpatrick, in his examination in chief, admitted that he had been to Kennedy's about 1 o'clock on the morning of the 13th of March.

This admission was before the jury at the time of the cross-examination of Fitzpatrick. All this testimony bore directly on the main fact. It was proper, therefore, to permit the questions to be asked for the purpose of affecting the credibility of the witness, and they were asked for that purpose. (Record, p. 93.)

Turning to the case cited by opposing counsel in support of their interpretation of the rule, the first case cited is that of *Oregon* v. *Lurch* (12 Oreg., 99). Lurch was charged with uttering a forged note. He took the stand, admitted the signing of the note, but set up the fact that the person whose name appeared to the note had authorized him to sign the name thereto. On cross-examination Lurch was required to write his own name, the name of the person whose name he was charged with forging, both in his ordinary handwriting and as nearly as possible like it appeared on the note. This the court held to to be error. The issue raised by his answers was whether he had or had not been authorized to signed the note, he having admitted the signing. The signing of the names in no way threw any light upon whether he had been authorized. All it did and what it did was to show that he had, in writing the signature to the note, attempted to imitate the handwriting of the person whose name he had signed. This was compelling him to furnish mute evidence which would contradict his oral testimony; in other words, compelling him to furnish evidence to contradict himself.

In *State* v. *Saunders* (14 Oreg., 300) Saunders was charged with and convicted of murder. The defendant took the stand in his own behalf and gave his version of

the murder. On cross-examination he was asked if he had not killed a man in Texas, and other similar questions, which the court compelled him to answer, and to which he gave qualified affirmative answers. The Supreme Court held this to be error, because they formed no part of the crime and had no connection whatever with it.

Lord, C. J., concurring in the judgment of reversal, states his opinion of the rule in these words, bottom page 316:

> The general rule in respect to any witness on cross-examination is that he may be cross-examined as to any facts and circumstances testified to by him on his direct examination; and, personally, I have been inclined to think that our statute was but a mere reaffirmation of this rule as to the accused, and that when he voluntarily took the witness stand he subjected himself to the same tests as are applied to any other witness, and in the sound discretion of the trial court may be cross-examined as to collateral facts calculated to test his credibility.

State v. *Gallo* (18 Oreg., 123) was a case in which Gallo had been convicted of grand larceny. In his defense he testified that he, the complaining witness, and a third party had gambled for the money alleged to have been stolen, and that it had been won by the third party.

On cross-examination he was asked whether at the time he gambled for this money he did not have certain counterfeit and Brazilian money in his possession, whether he wagered good money, and if it was not a fact that he staked this counterfeit money. This was alleged to be

error. While the record did not disclose the answers given, the court, in disposing of the objection, said (p. 425):

> I am inclined to think that these questions do not fall within the objection successfully urged in *State* v. *Lurch*, 12 Or., and *State* v. *Saunders*, 14 Or., 302. The defendant had testified that he wagered $100 at the game. Whether he did so was a question for the jury, and if, by his cross-examination, the State could make it appear that what he did in fact wager was of no value it would tend to contradict him, and I think would be legitimate cross-examination.

IV.

THE TESTIMONY IN REBUTTAL.

As to the testimony of Deputy Marshal Snook respecting the reputation of Fitzpatrick at Dyea, it is sufficient to say that the defendant has put his reputation in issue by the introduction of the affidavit of Mary Dickson. (Record, p. 99.) It was competent for the Government then, on rebuttal, to show what his reputation was in the community where the crime was committed and at the time it was committed. Further, the question objected to was excluded, and no exceptions were taken to the other questions asked the witness.

Captain Young, although called as a witness, was not permitted to testify, so no prejudice resulted from anything he said.

As to the testimony of Dr. White with respect to the effect of light from the flash of a revolver at night, it is a sufficient answer to say that the defense had offered in evidence a calendar (Record, p. 97) for the purpose of

affecting the credibility of witnesses for the Government, and as showing the darkness of the night. His evidence was competent as showing that notwithstanding the character of the night, there was sufficient light from the flash of the revolver to identify a person by the flash.

V.

WAS FITZPATRICK CONVICTED OF A "CAPITAL CRIME?"

The act of March 3, 1891 (26 Stat., 826), as amended by the act of January 20, 1897 (29 Stat., 492), withdraws from this court the jurisdiction of criminal cases not capital, and confers the same on the circuit courts of appeal. This court has now jurisdiction only "in cases of conviction of a capital crime." It is a question not yet decided by this court whether a defendant is convicted of a capital crime where the jury, under the act of January 15, 1897 (29 Stat., 487), qualify their verdict by adding the words "without capital punishment," thus taking from the crime its capital character. Doubtless, a man indicted for murder under section 5339 United States Revised Statutes is *charged* with a capital crime. But is a man convicted of a capital crime when the jury, acting under the authority of the act of January 15, 1897, "to reduce the cases in which the penalty of death may be inflicted," qualified their verdict by adding thereto "without capital punishment," and thus attach to the particular crime the punishment defined by this act, which is that "the person convicted shall be sentenced to imprisonment at hard labor for life." As soon as the jury thus qualified their verdict the crime ceased to be a capital crime,

and under this statute became a crime with a clearly defined noncapital punishment, to wit, the punishment of imprisonment at hard labor for life.

The object of the act of January 20, 1897, was to relieve this court of the consideration of criminal cases except where, by reason of the conviction, the man's life was in jeopardy. In other words, only a man under sentence of death was to be permitted to carry his case directly to this court.

CONCLUSION.

The crime was a dastardly one—a clear case of lying in wait to rob. Fitzpatrick was tried fairly, convicted justly, and treated by the jury most leniently. Directly after his trial, Corbett and Brooks were tried and convicted (Record, pp. 27, 28). Almost two years have elapsed. The shifting character of the population of Alaska is well known. It is doubtful whether the Government could obtain its witnesses for another trial. This may explain the effort being made for a reversal. I fancy it is not so much a new trial that the plaintiff in error wants, as it is no trial. The objections urged are technical, if not trivial. If there were irregularities, which I do not concede, they were not prejudicial to Fitzpatrick. Substantial justice was done and the conviction should stand.

JOHN K. RICHARDS,
Solicitor-General.

MAY 7, 1900.

O

OPINION

FITZPATRICK *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

Submitted April 30, 1900. — Decided May 28, 1900.

Under the Court of Appeals Act of March 3, 1891, a conviction for murder is a "conviction of a capital crime," though the jury qualify their verdict of guilty by adding the words "without capital punishment." The test of a capital crime is not the punishment which is imposed, but that which may be imposed under the statute.

Under the statute of Oregon requiring the offence to be stated "in ordinary and concise language and in such manner as to enable a person of common understanding to know what was intended," an indictment for murder charging that the defendant feloniously, purposely, and of deliberate and premeditated malice inflicted upon the deceased a mortal wound of which he instantly died is a sufficient allegation of premeditated and deliberate malice in killing him.

Evidence that one jointly indicted with the defendant was found to have been wounded in the shoulder, and his accompanying statement that he had been shot, were held to be competent upon the trial of the defendant.

Any fact which had a bearing upon the question of defendant's guilt immediate or remote and occurring at any time before the incident was closed, was held proper for the consideration of the jury, although statements made by other defendants in his absence implicating him with the murder would not be competent.

The prisoner taking the stand in his own behalf and swearing to an alibi was held to have been properly cross-examined as to the clothing worn by him on the night of the murder, his acquaintance with the others jointly indicted with him, and other facts showing his connection with them.

Where an accused party waives his constitutional privilege of silence and takes the stand in his own behalf and makes his own statement, the prosecution has a right to cross-examine him upon such statement with

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the same latitude as would be exercised in the case of an ordinary witness as to the circumstances connecting him with the alleged crime.
Evidence in rebuttal with respect to the effect of light from the flash of a revolver was held to be competent where the defence put in a calendar, apparently for the purpose of showing the time the moon rose that night.

THIS was a writ of error to review the conviction of Fitzpatrick, who was jointly indicted with Henry Brooks and William Corbett for the murder of Samuel Roberts, on March 13, 1898, at Dyea, in the Territory of Alaska.

The indictment, omitting the formal parts, was as follows:

"The said John Fitzpatrick, Henry Brooks and William Corbett at or near Dyea, within the said district of Alaska, and within the jurisdiction of this court, and under the exclusive jurisdiction of the United States, on the 13th day of March, in the year of our Lord one thousand eight hundred and ninety-eight, did unlawfully, wilfully, knowingly, feloniously, purposely, and of deliberate and premeditated malice make an assault upon one Samuel Roberts, and that they, the said John Fitzpatrick, Henry Brooks and William Corbett, a certain revolver, then and there charged with gunpowder and leaden bullets, which said revolver they, the said John Fitzpatrick, Henry Brooks and William Corbett, in their hands then and there had and held, then and there feloniously, purposely and of deliberate and premeditated malice did discharge and shoot off to, against and upon the said Samuel Roberts; and that said John Fitzpatrick, Henry Brooks and William Corbett with one of the bullets aforesaid out of the revolver aforesaid then and there by force of the gunpowder aforesaid by the said John Fitzpatrick, Henry Brooks and William Corbett, discharged and shot off as aforesaid then and there feloniously, purposely and with deliberate and premeditated malice did strike, penetrate and wound him, the said Samuel Roberts, in and upon the right breast of him, the said Samuel Roberts, then and there with the leaden bullet aforesaid so as aforesaid discharged and shot out of the revolver aforesaid by the said John Fitzpatrick, Henry Brooks and William Corbett, in and upon the right breast of him the said Samuel Roberts one

mortal wound, of which said mortal wound he, the said Samuel Roberts, instantly died, and so the grand jurors duly selected, empaneled, sworn and charged as aforesaid upon their oaths do say: That said John Fitzpatrick, Henry Brooks and William Corbett did then and there kill and murder the said Samuel Roberts in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

"BURTON E. BENNETT,
"*U. S. District Attorney.*"

After a demurrer to the indictment, which was overruled, and a motion for a continuance, which was denied, Brooks and Corbett moved and obtained an order for separate trials. The court thereupon proceeded to the trial of Fitzpatrick, the jury returning a verdict of guilty "without capital punishment." Motions for a new trial and in arrest of judgment were entered, heard and overruled, and defendant sentenced to hard labor for life in the penitentiary at San Quentin, California. To review such judgment a writ of error was sued *in forma pauperis.*

Mr. A. B. Browne, *Mr. Julius Kahn* and *Mr. Alexander Britton* for plaintiff in error.

Mr. Solicitor General for the United States.

MR. JUSTICE BROWN, after making the above statement, delivered the opinion of the court.

1. A suggestion is made by the government of a want of jurisdiction in this case, upon the ground that it is not of a "conviction of a capital crime" within section five of the Court of Appeals act of March 3, 1891, c. 517, 26 Stat. 826, as amended by act of January 20, 1897, c. 68, 29 Stat. 492, specifying the cases in which a writ of error may be issued directly to a District Court. It is clear, however, that, as section 5339 of the Revised Statutes inflicts the penalty of death for murder, the power given

the jury by the act of January 15, 1897, c. 29, 29 Stat. 487, to qualify the verdict of guilty by adding the words "without capital punishment," does not make the crime of murder anything less than a capital offence, or a conviction for murder anything less than a conviction for a capital crime, by reason of the fact that the punishment actually imposed is imprisonment for life. The test is not the punishment which *is* imposed, but that which *may be* imposed under the statute. As was observed in *In re Claasen*, 140 U. S. 200, 205, with respect to infamous crimes under the Court of Appeals act prior to its amendment: "A crime which is punishable by imprisonment in the state prison or penitentiary, as the crime of which the defendant was convicted, is an infamous crime whether the accused is or is not sentenced or put to hard labor; and that, in determining whether the crime is infamous, the question is, whether it is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one." See also *Ex parte Wilson*, 114 U. S. 417, 426; *Logan* v. *United States*, 144 U. S. 263, 308; *The Paquete Habana*, 175 U. S. 677, 682; *Motes* v. *United States*, *post*. A conviction for murder, punishable with death, is not the less a conviction for a capital crime by reason of the fact that the jury, in a particular case, qualifies the punishment.

2. The first question raised by the plaintiff in error relates to the sufficiency of the indictment, which was for a violation of Rev. Stat., section 5339. This section, eliminating the immaterial clauses, declares that "every person who commits murder . . . within any fort . . . or in any other place or district of country under the exclusive jurisdiction of the United States . . . shall suffer death." This section does not define the crime of murder, but prescribes its punishment.

By section seven of an act providing a civil government for Alaska, approved May 17, 1884, c. 53, 23 Stat. 24, it is enacted "that the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States." We are, therefore, to look to the law of Oregon and the interpretation put thereon

by the highest court of that State, as they stood on the day this act was passed, for the requisites for an indictment for murder rather than to the rules of the common law.

By Hill's Annotated Laws of Oregon, section 1268, c. 8, title 1, relating to criminal procedure, an indictment must contain:

"1. The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties;

"2. A statement of the acts constituting the offence, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended."

In *State* v. *Dougherty*, 4 Oregon, 200, 205, the Supreme Court of that State had held that "the indictment should always contain such a specification, of acts and descriptive circumstances as will, upon its face, fix and determine the identity of the offence, and enable the court, by an inspection of the record alone, to determine whether, admitting the truth of the specific acts charged, a thing has been done which is forbidden by law."

By section 1270, Hill's Laws, it is provided that "the manner of stating the act constituting the crime, as set forth in the appendix to this code, is sufficient, in all cases where the forms there given are applicable, and in other cases forms may be used as nearly similar as the nature of the case will permit;" and in an appendix to this section the following form is given for murder: "And purposely and of deliberate and premeditated malice killed C. D. by shooting him with a gun or pistol, or by administering to him poison, or," etc.

It will be noticed that section 1270 only declares that the form given in the appendix is sufficient in all cases where the forms there given are applicable, but it does not purport to be exclusive of other forms the pleader may choose to adopt. It does not declare the insufficiency of other forms, but merely the sufficiency of those contained in the appendix. We are, therefore, remitted to section 1268 to inquire whether the indictment contains "a statement of the acts constituting the offence, in ordinary and concise language, without repetition,

and in such manner as to enable a person of common understanding to know what is intended." This section was doubtless intended to modify to a certain extent the strictness of the common law indictment, and simply to require the statement of the elements of the offence in language adapted to the common understanding of the people, whether it would be regarded as sufficient by the rules of the common law or not. *People* v. *Dolan*, 9 Cal. 576; *People* v. *Ah Woo*, 28 Cal. 205; *People* v. *Rodriguez*, 10 Cal. 50. As was said by this court in *United States* v. *Cruikshank*, 92 U. S. 542, 558, "the object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had."

The indictment in this case, omitting the immaterial parts, avers that the accused "did unlawfully, wilfully, knowingly, feloniously, purposely, and of deliberate and premeditated malice, make an assault upon one Samuel Roberts," and a certain loaded revolver "then and there feloniously, purposely and of deliberate and premeditated malice did discharge and shoot off to, against and upon the said Samuel Roberts," and one of the bullets aforesaid, discharged as aforesaid, "feloniously, purposely and deliberate and premeditated malice did strike, penetrate and wound him, the said Samuel Roberts, in and upon the right breast, . . . one mortal wound, of which he, the said Samuel Roberts, instantly died;" and further, that the defendants "did then and there kill and murder the said Samuel Roberts in the manner and form aforesaid, contrary," etc.

Defendant criticises this indictment as failing to aver deliberate and premeditated malice in killing Roberts, although it is averred that the defendants did, with deliberate and premeditated malice, inflict a *mortal* wound, of which he instantly died, and that they killed and murdered him in the manner and form aforesaid. If, as alleged in the indictment, they, with deliberate and premeditated malice, shot Roberts in the breast with a

revolver, and inflicted a mortal wound, of which he instantly died, they would be presumed to contemplate and intend the natural and probable consequences of such act; and an additional averment that they, with deliberate and premeditated malice intended to kill him, was quite unnecessary to apprise the common understanding of their purpose. If they purposely inflicted a mortal wound, they must have intended to kill. No person could have a moment's hesitation as to what it was intended to aver, namely, that the defendants had been guilty of a deliberate and premeditated murder; and while a number of cases are cited which lend some support to the argument of the defendant, there was no such statute involved as section 1268 of the Oregon Code. We have no doubt the indictment furnished the accused with such a description of the charge as would enable him to avail himself of a plea of former jeopardy, and also to inform the court whether the facts were sufficient in law to support a conviction, within the ruling in the *Cruikshank case*. While we should hold an indictment to be insufficient that did not charge in definite language all the elements constituting the offence, we have no desire to be hypercritical or to require the pleader to unduly repeat as to every incident of the offence the allegation of deliberateness and premeditation. We are bound to give some effect to the provisions of section 1268 in its evident purpose to authorize a relaxation of the extreme stringency of criminal pleadings, and make that sufficient in law which satisfies the "common understanding" of men.

3. Certain exceptions to the admission of testimony render it necessary to notice the more prominent facts of the case. The murder took place at Dyea, Alaska, just outside the cabin of Roberts. Roberts conducted certain games at the Wonder Hotel or saloon, and slept in his cabin across the street, about a hundred and fifty feet from the saloon. Ross and Brennan, two of the government witnesses, were employed by Roberts in connection with the games. Ross testified that, about two o'clock in the morning, Roberts, the deceased, asked the witnesses to accompany him from the Wonder Hotel to the cabin, and to carry a sack of money used at the games. Roberts was

in the habit of going to his cabin every night accompanied by a man carrying the sack. They entered the cabin, and, while Roberts struck a match, something suspicious seemed to occur, and both stepped outside the door. Instantly there was a report of a gun inside the cabin. Roberts crowded witness off the porch, the sack of money fell off witness's shoulder, and he fell off the steps. As he fell he heard the report of a pistol from outside the cabin, and soon heard hurried footsteps close to him. He then heard the report of a gun from inside the cabin, and in a few seconds a man came out, stood on the porch, raised his gun and fired two shots in the direction of the Wonder Hotel, turned to the right in a leisurely manner, got off the steps and disappeared behind the north side of the house. Witness recognized this man as Fitzpatrick, the defendant. As Fitzpatrick disappeared, witness called for help, and Brennan and others came over from the hotel with a lantern. Roberts was found lying on his back, fatally wounded, and almost immediately died.

Brennan, who was at the hotel, saw Roberts start with Ross, with the sack, to go to the cabin. In a few minutes he heard a shot, and started toward the door, but before he got to the door there was another shot, and, when he reached the pavement, still another, which seemed to come from the cabin. Witness ran back to the hotel, got a gun and lantern, ran across the street, found Ross first, and then Roberts on his back dying. There was some other testimony to the same general effect.

The testimony to which objection was made was that of Ballard, a soldier on guard duty at Dyea on the night of the occurrence, who testified that about two o'clock in the morning he heard four or five shots from the direction of Roberts' cabin and the Wonder Hotel, and that some fifteen or twenty minutes or half an hour thereafter, a man came to him. "I was in the cabin, and he rapped on the door, and I went and opened the door for him, and he said he would like to get a doctor. He was shot. . . . I directed him to the hospital in town, and he went that way." Witness said that he did not know the man, but was afterwards told that his name was Corbett. He was brought into court, but witness could not identify him with certainty.

Objection was also made to the testimony of Dr. Price, who swore that about three o'clock in the morning Corbett applied to him for medical assistance; that he was wounded in the right shoulder, and witness was in attendance upon him about three weeks or a month. Also to the testimony of John Cudihee, deputy United States marshal, who arrested Fitzpatrick, Brooks and Corbett the day of the murder, and made an investigation. He found Roberts in his cabin dead, then went to Fitzpatrick and Corbett's cabin, and found there a lot of shoes and clothing covered with blood. The witness produced the shoes in evidence, pointed out which pair was Fitzpatrick's and which was Corbett's, explained that Fitzpatrick had identified the shoes in his office, and pointed out which pair was Corbett's and which was his. Witness also pointed out the blood stains on both shoes. Corbett's shoe fitted the footprints in the sand which the witness found in the rear of Roberts' cabin, where the shooting occurred. The shoe had hobnails in it, and the heel of one was worn off so the print in the sand was a peculiar one.

Objection was made to the admission of any testimony relating to the acts of Corbett, and especially that which occurred after the alleged crime had been committed. No direct testimony appears in the record showing the presence of Corbett at the cabin before, during or after the commission of the crime for which Fitzpatrick was then on trial. Had the statement of Corbett, that he was shot, and inquiring for a doctor, tended in any way to connect Fitzpatrick with the murder, it would doubtless have been inadmissible against him upon the principle announced in *Sparf and Hansen* v. *United States*, 156 U. S. 51, that statements made by one of two joint defendants in the absence of the other defendant, while admissible against the party making the statement, are inadmissible against the other party. In that case declarations of Hansen connecting Sparf with the homicide there involved, tending to prove the guilt of both, and made in the absence of Sparf, were held inadmissible against the latter. This is a familiar principle of law; but the statement of Ballard was not within this rule. Corbett had evidently been wounded, and was asking for a doctor. His accompanying statement that he was shot was clearly compe-

tent to explain his condition, and had no tendency whatever to connect Fitzpatrick with the transaction. This statement, as well as that of Dr. Price, to the effect that he found Corbett with a wound in his right shoulder, and that of Cudihee as to finding a lot of shoes and clothing covered with blood, and connecting one pair of these shoes with the footprints found near Roberts' cabin, were all facts connected with the crime which the government was entitled to lay before the jury. Fitzpatrick and Corbett roomed together. Their bloody clothes and shoes were found in their cabin the morning after the murder. Brooks had roomed with them. Brooks and Corbett in their affidavit for a continuance swore in effect that they were together that night, and attempted to establish a joint alibi.

There was no doubt that a homicide had been committed, and it was the province of the jury to determine whether the defendant was a guilty party. Any fact which had a bearing upon this question, immediate or remote, and occurring at any time before the incident was closed, was proper for the consideration of the jury. Of course, statements made in the absence of Fitzpatrick implicating him with the murder would not be competent, but none such were admitted; but any act done, whether in Fitzpatrick's presence or not, which had a tendency to connect him with the crime, was proper for the consideration of the jury, and the fact that Corbett was not then on trial is immaterial in this connection. As there was some evidence tending to show a joint action on the part of the three defendants, any fact having a tendency to connect them with the murder was competent upon the trial of Fitzpatrick. The true distinction is between statements made after the fact, which are competent only against the party making the statement, and facts connecting either party with the crime which are competent as a part of the whole transaction. In the trial of either party it is proper to lay before the jury the entire affair, including the acts and conduct of all the defendants from the time the homicide was first contemplated to the time the transaction was closed. It may have a bearing only against the party doing the act, or it may have a remoter bearing upon the other defendants; but such as it is, it is competent to be laid before the jury.

In *People* v. *Cleveland*, 107 Mich. 367, error was assigned by the defendant in permitting the prosecution to show the acts of one Mehan, jointly indicted with Cleveland in the affray; his appearance on the way to Jackson, and on the succeeding days; the excuse he gave for his then condition, and the result of an examination of his clothing. But the court said: "It is apparent from the testimony that the three parties, when they left Jackson, had arranged to engage in this robbery, . . . and the arrangement had been carried out so far as they were able to do so. It was therefore proper to show the condition of Mehan, who was not on trial, for the purpose of establishing his identity as one of the men who accompanied the respondent Cleveland from Jackson to Somerset Center, thus identifiying the latter's connection with the robbery."

So, in *Angley* v. *State*, 35 Tex. Crim. Rep. 427, error was assigned upon the admission of testimony to show the character of shoes Rice (who was connected with the transaction but not jointly indicted) had on when arrested the day after the assault. One ground of the objection was that Rice was not jointly indicted with Angley. When Rice was arrested and his shoes examined it was found that one of them had a hole in the sole fitting a corresponding peculiarity in the track found upon the ground. The court held this testimony proper, though Rice was separately indicted, because the conspiracy had been shown. This was a circumstance tending to show that he was one of the parties present at the time the assault was committed.

4. Error is also assigned in not restricting the cross-examination of the plaintiff in error. Defendant himself was the only witness put upon the stand by the defence, who was connected with the transaction; and he was asked but a single question, and that related to his whereabouts upon the night of the murder. To this he answered: "I was up between Clancy's and Kennedy's. I had been in Clancy's up to about half-past twelve or one o'clock — about one o'clock, I guess. I went up to Kennedy's and had a few drinks with Captain Wallace and Billy Kennedy, and I told them I was getting kind of full and I was going home, and along about quarter past one Wallace brought me down about as far as Clancy's, and then he took me down

to the cabin and left me in the cabin, and we wound the alarm clock and set it to go off at six o'clock, and I took off my shoes and lay down on the bunk and woke up at six o'clock in the morning, and went up the street."

On cross-examination the government was permitted, over the objection of defendant's counsel, to ask questions relating to the witness's attire on the night of the shooting, to his acquaintance with Corbett, whether Corbett had shoes of a certain kind, whether witness saw Corbett on the evening of March 12, the night preceding the shooting, whether Corbett roomed with Fitzpatrick in the latter's cabin, and whether witness saw any one else in the cabin besides Brooks and Corbett. The court permitted this upon the theory that it was competent for the prosecution to show every movement of the prisoner during the night, the character of his dress, the places he had visited and the company he had kept.

Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts. The witness having sworn to an alibi, it was perfectly competent for the government to cross-examine him as to every fact which had a bearing upon his whereabouts upon the night of the murder, and as to what he did and the persons with whom he associated that night. Indeed, we know of no reason why an accused person, who takes the stand as a witness, should not be subject to cross-examination as other witnesses are. Had another witness been placed upon the stand by the defence, and sworn that he was with the prisoner at Clancy's and Kennedy's that night, it would clearly have been competent to ask what the prisoner wore, and whether the witness saw Corbett the same night or the night before, and whether they were fellow

occupants of the same room. While the court would probably have no power of compelling an answer to any question, a refusal to answer a proper question put upon cross-examination has been held to be a proper subject of comment to the jury, *State* v. *Ober*, 52 N. H. 459; and it is also held in a large number of cases that when an accused person takes the stand in his own behalf, he is subject to impeachment like other witnesses. If the prosecution should go farther and compel the defendant, on cross-examination, to write his own name or that of another person, when he had not testified in reference thereto in his direct examination, the case of *State* v. *Lurch*, 12 Oregon, 99, is authority for saying that this would be error. It would be a clear case of the defendant being compelled to furnish original evidence against himself. *State* v. *Saunders*, 14 Oregon, 300, is also authority for the proposition that he cannot be compelled to answer as to any facts not relevant to his direct examination.

5. Error is also assigned to the action of the court in permitting the government to call and examine witnesses in rebuttal with respect to the effect of light from the flash of a revolver, and whether such light would be sufficient to enable a person firing the revolver to be identified. One of the witnesses, Ross, testified on cross-examination that although the night was dark, he identified Fitzpatrick by the flash of the pistol shots.

Had the defence put in no evidence whatever upon the subject, the question would have been presented whether it was or was not a matter of discretion for the court to admit this testimony in rebuttal; but in view of the fact that the defence put in a calendar apparently for the purpose of showing the time that the moon rose that night, as having some bearing upon this question, there was no impropriety in putting in this testimony.

There was no error committed upon the trial prejudicial to the defendant, and the judgment of the District Court is therefore

Affirmed.